Supreme Court, U. S.
FILED
SEP 3 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-353, 75-354, and 75-355

In the Supreme Court of the United States

OCTOBER TERM, 1976

HOWARD PIPER, ET AL., PETITIONERS

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

THE FIRST BOSTON CORPORATION, PETITIONER

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

BANGOR PUNTA CORPORATION, ET AL., PETITIONERS

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

DAVID FERBER,
Solicitor,

HARVEY L. PITT,
General Counsel,
RALPH C. FERRARA,
Special Counsel,

Securities and Exchange Commission,
Washington, D.C. 20549.

ANDREW M. KLEIN,
Special Counsel,

JACOB H. STILLMAN,
Assistant General Counsel,

EGON GUTTMAN,*
Attorney Fellow,

IRVING H. PICARD,
Assistant General Counsel,

LEWIS H. MENDELSON,
Special Counsel,

JAMES H. SCHROPP,
Special Counsel,

KENNETH T. SPIRER,
Special Counsel,

RICHARD T. SHARP,
SAMMY S. KNIGHT,
FRANK A. WILSON,
SUE AUERBACH,
JOHN P. SWEENEY,
VERNON I. ZVOLEFF,
Attorneys,

Securities and Exchange Commission,
Washington, D.C. 20549 **

---

* Professor Guttman is a member of the Middle Temple, Barrister at Law.

** Richard Weingarten, a May, 1976, graduate of the Antioch School of Law, Linda W. Jarrett, a May, 1976, graduate of the Georgetown University Law Center, and Catherine Scanlon, a third year student at the American University Washington College of Law, also assisted in the preparation of this brief.

TABLE OF CONTENTS

	Page
CITATIONS	IV
QUESTIONS ADDRESSED	2
INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION	3
INTRODUCTION	3
SUMMARY OF DISCUSSION	5
DISCUSSION	20
I. IN ADOPTING THE WILLIAMS ACT IN 1968, CONGRESS INTENDED TO PROVIDE A COMPREHENSIVE SCHEME OF FEDERAL REGULATION FOR ALL TENDER OFFERS, AND TO CREATE FEDERAL RIGHTS FOR, AND OBLIGATIONS UPON, ALL PERSONS PARTICIPATING IN, OR DIRECTLY AFFECTED BY, CASH AND EXCHANGE TENDER OFFERS	20
A. The Dynamics of Tender Offers: The Contest for Control	22
1. The emergence of the tender offer	22
2. The participants	27
a. The offeror	27
b. The target	31
c. The arbitrageur	35
d. The dealer-manager	38
B. Prior to the Adoption of the Williams Act, Tender Offers Were Virtually Unregulated, in Contrast to the Comprehensive Federal Regulation of Proxies and Proxy Contests	42
C. Regulation of Tender Offers Was Needed Because Significant Abuses Had Developed	48

DISCUSSION—Continued Page

D. In Passing the Williams Act, Congress Intended to Fill the Regulatory Gap by Enacting a Comprehensive Scheme of Regulation Comparable to That Which Governed Proxy Contests 52

E. The Williams Act Provides a Pervasive Scheme of Federal Regulation of Tender Offers 54

F. Congress Recognized that the Williams Act Should Protect All Persons Interested in, or Affected by, Tender Offers 69

II. CONSISTENT WITH ITS PRIOR TEACHINGS, SOUND POLICY, AND UNDERLYING CONGRESSIONAL INTENT, THIS COURT SHOULD AFFIRM THAT A PRIVATE RIGHT OF ACTION MAY BE IMPLIED UNDER SECTION 14(e) OF THE SECURITIES EXCHANGE ACT ON BEHALF OF A COMPETING TENDER OFFEROR AGAINST THOSE WHOSE MISLEADING STATEMENTS HAVE INJURED IT 74

A. Tender Offerors Are Within the Especial Class for Whose Benefit the Williams Act Was Enacted 82

1. The Williams Act Is a Pervasive Legislative Scheme Governing the Relationship Between a Tender Offeror and the Other Participants in a Contest for Control, Including the Target, a Competing Tender Offeror and Their Allies 83

2. The Williams Act Creates an Articulated Federal Right in Favor of Each of the Participants in the Contest for Control, Including Tender Offerors 86

B. Congress Was Aware of the Importance of Private Remedies for Participants in Tender Offers in Enacting the Williams Act 90

DISCUSSION—Continued Page

C. It Is Consistent with the Underlying Purposes of the Legislative Scheme of the Williams Act to Imply a Private Remedy for Tender Offerors 94

1. Private Rights of Action Are a Necessary Supplement to Commission Action to Make Effective the Congressional Purpose in Enacting the Williams Act 95

2. Judicial Determinations Under the Proxy Regulation Provisions of the Securities Exchange Act Have Provided Those Private Remedies Necessary to Make Effective the Congressional Purpose 103

3. Prior Judicial Determinations Under Section 14(e) of the Williams Act Have Mirrored Actions by the Courts in Providing Private Remedies to Proxy Contestants and Shareholders Necessary to Make Effective the Congressional Purpose in Enacting the Williams Act 112

D. The Williams Act Is an Intrusion of Federal Law into the Internal Affairs of Corporations and a Federal Remedy Is Appropriate to Effect the Congressional Purpose to Provide Protections to Those Involved in a Tender Offer 123

III. ANY LIMITATIONS THE COURTS IMPOSE ON THE MAINTENANCE OF, OR ON THE RELIEF GRANTED UNDER, AN IMPLIED PRIVATE RIGHT OF ACTION, SHOULD EFFECTUATE IMPORTANT PUBLIC POLICY CONSIDERATIONS, AS GLEANED BOTH FROM THE CONGRESSIONAL INTENT UNDERLYING THE STATUTORY BASIS FOR THE IMPLIED PRIVATE ACTION AND FROM THE JUDICIALLY-ENUNCIATED PURPOSES THE IMPLIED REMEDY IS TO SERVE 129

DISCUSSION—Continued Page

IV. SECURITIES EXCHANGE ACT RULE 10b-6 WAS ADOPTED TO PRECLUDE ACTUAL OR POTENTIAL MANIPULATIVE CONDUCT IN CONNECTION WITH THE PUBLIC DISTRIBUTION OF SECURITIES, INCLUDING EXCHANGE TENDER OFFERS, AND THERE IS A PRIVATE ACTION ON BEHALF OF ANY PERSON ADVERSELY AFFECTED BY VIOLATION OF THE RULE 163

CONCLUSION 194

CITATIONS *

Cases:

Abrahamson v. *Fleschner*, 392 F. Supp. 740 (S.D. N.Y., 1975), appeal pending, Docket No. 75-7203 (C.A. 2, 1975) 142

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 18, 84, 141, 142, 144-147

Alaska Interstate Co. v. *McMillan*, 402 F. Supp. 532 (D. Del., 1975) 122

American Power & Light Co. v. *Securities and Exchange Commission*, 329 U.S. 90 (1946) 21

Bailey v. *Meister Brau, Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,543 (C.A. 7, May 6, 1976) 153, 189

Bath Indus., Inc. v. *Blot*, 427 F.2d 97 (C.A. 7, 1970) 85, 139

Beatty v. *Bright*, 318 F. Supp. 169 (1970), *supplemented*, 345 F. Supp. 1188 (S.D. Iowa, 1972) 107, 110

Bell v. *Hood*, 327 U.S. 678 (1946) 78, 107, 139

Berley v. *Dreyfus & Co.*, 43 F.R.D. 397 (S.D. N.Y., 1967) 142

Berman v. *Thompson*, 312 F. Supp. 1031 (N.D. Ill., 1970) 107

Birnbaum v. *Newport Steel Corp.*, 193 F.2d 461 (C.A. 2, 1952), certiorari denied, 343 U.S. 956 (1952) 92

* The Appendix volume of the Parties is divided into sections A through F. "A", "B", "C", "D", "E", and "F" page references are to the sections of that volume.

Cases—Continued Page

Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) 82, 107

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) ..... 16, *et passim*

Bound Brook Water Co. v. *Jaffee*, 284 F. Supp. 702 D. N.J., 1968) 108

Britton v. *Schweickart*, CCH Fed. Sec. L. Rep. ¶ 91,029 (S.D. N.Y., 1961) 193

Broder v. *Dane*, 384 F. Supp. 1312 (S.D. N.Y., 1974) 113

Bruns, Nordeman & Co., 40 S.E.C. 652 (1961) 179

Butler Aviation International, Inc. v. *Comprehensive Designers, Inc.*, 425 F.2d 842 (C.A. 2, 1970) 94, 116

Canusa Gold Mines, Ltd., 2 S.E.C. 548 (1937) 178

Casey v. *Woodruff*, 49 N.Y.S. 2d 625 (Spec. Term, N.Y. Cty. 1944) 46

Cattlemen's Investment Co. v. *Fears*, 343 F. Supp. 1248 (W.D. Okla., 1972) 116

Cauble v. *White*, 360 F. Supp. 1021 (E.D. La., (1973) 122

In re Caesars Palace Securities Litigations, 360 F. Supp. 366 (S.D. N.Y., 1973) 142

Central Founding Co. v. *Gondleman*, 166 F. Supp. 429 (S.D. N.Y., 1958) 104

Cheff v. *Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (1964) 46, 72

In the Matter of Collins Securities Corp., 8 SEC Docket 250, Securities Exchange Act Rel. No. 11766 (Oct. 23, 1975), appeal pending, No. 75-2200 (C.A.D.C.) 180

Commonwealth Oil Refining Co. v. *Tesoro Petroleum Corp.*, 394 F. Supp. 267 (S.D. N.Y., 1975) .. 116

Condec Corp. v. *Lunkenheimer Corp.*, 43 Del. Ch. 353, 220 A. 2d 769 (1967) 46

Copperweld Corp. v. *Imetal*, 403 F. Supp. 579 (W.D. Pa., 1975) 5, 116, 191

Corenco Corp. v. *Schiavone & Sons, Inc.*, 498 F.2d 207 (C.A. 2, 1973) 116

Cases—Continued

Page

Cort v. *Ash*, 422 U.S. 66 (1975) ..... 8, *et passim*
Couch v. *Steel*, 3 E. & B. 402, 118 Eng. Reprint, 1193 (Q.B., 1854) 78
Crane Co. v. *American Standard, Inc.*, 490 F.2d 332 (C.A. 2, 1973) 111, 148, 192
Crane Co. v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (C.A. 2, 1969) 89, 93-94, 111, 117-118, 187, 192-194
D-Z Investment Co. v. *Holloway*, CCH Fed. Sec. L. Rep. ¶ 94,771 (S.D. N.Y., 1974) 116
Dale v. *Temple Co.*, 186 Tenn. 69, 208 S.W. 2d 344 (1948) 44
Dann v. *Studebaker-Packard Corp.* 288 F.2d 201 (C.A. 6, 1961) 104-105, 107, 124
Deckert v. *Independence Shares Corp.*, 311 U.S. 282 (1940) 136, 139, 148
deHaas v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo., 1968) affirmed in part and vacated in part, 435 F.2d 1223 (C.A. 10, 1970) 141, 160
Denison Mines, Ltd. v. *Fibreboard Corp.*, 388 F. Supp. 812 (D. Del., 1974) 107
DeSantis v. *City of Troy*, 371 N.Y.S. 2d 310 (Sup. Ct., Rens., Cty., 1975) 45
DiJulio v. *Digicon, Inc.*, 339 F. Supp. 1284 (D. Md., 1972) 191
Dillon v. *Berg*, 326 F. Supp. 1214 (D. Del., 1971), affirmed, 453 F.2d 876 (C.A. 3, 1971) 106, 108
Dodge v. *Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919) 27
Donlon Indus., Inc. v. *Forte*, 402 F.2d 935 (C.A. 2, 1968) 153
Doyle v. *Milton*, 73 F. Supp. 281 (S.D. N.Y., 1947) 104, 110
Dunn v. *Decca Records*, 120 F. Supp. 1 (S.D. N.Y., 1954) 104
Dyer v. *Eastern Trust and Banking Co.*, 336 F. Supp. 890 (D. Me., 1971) 114, 118, 120, 122-123, 137
Electronic Specialty Co. v. *International Controls Corp.*, 409 F.2d 937 (C.A. 2, 1969) 93-94, 110, 114-115, 122-123, 137

Cases—Continued

Page

Ellis v. *Carter*, 291 F.2d 270 (C.A. 9, 1961) 152-153
Emhart Corp. v. *USM Corp.*, 403 F. Supp. 660 (D. Mass., 1975), vacated, 527 F.2d 177 (1975) .. 122
Ernst & Ernst v. *Hochfelder*, 96 S. Ct. 1375 (1976) ..... 17, *et passim*
Fabrikant v. *Jacobellis*, CCH Fed. Sec. L. Rep. ¶ 92,686 (E.D. N.Y., 1970) 114
Federal Corporation, 25 S.E.C. 227 (1947) 178
Federal Trade Commission v. *Klesner*, 280 U.S. 19 (1929) 149-150
Fischman v. *Raytheon Mfg. Co.*, 188 F.2d 783 (C.A. 2, 1951) 152-153
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 129
Fundamental Investors, Inc., 41 SEC 285 (1962) .. 103
GAF Corp. v. *Milstein*, 453 F.2d 709 (C.A. 2, 1971) 85
General Time Corp. v. *Talley Indus., Inc.*, 403 F.2d 159 (C.A. 2, 1968) 108
Gerdes v. *Reynolds*, 28 N.Y.S. 2d 622 (Sup. Ct., 1941) 44
Gerstle v. *Gamble Skogmo, Inc.*, 478 F.2d 1281 (C.A. 2, 1973) 155
Glenn v. *Point Park College*, 272 A.2d 895 (Pa., 1971) 45
Globus v. *Law Research Service, Inc.*, 418 F.2d 1276 (C.A. 2, 1969), certiorari denied, 397 U.S. 913 (1970) 142, 160
Goldman v. *Bank of Commonwealth*, 332 F. Supp. 699 (E.D. Mich., 1971), affirmed, 467 F.2d 439 (C.A. 6, 1972) 143
Gould v. *American Hawaiian Steamship Company*, 523 F.2d 761 (C.A. 3, 1976) 153, 155
Greater Iowa Corp. v. *McLendon*, 378 F.2d 783 (C.A. 8, 1967) 108
Green v. *Wolf Corp.*, 406 F.2d 291 (C.A. 2, 1968), certiorari denied, 395 U.S. 977 (1969) 141-142
Gulf & Western Industries, Inc. v. *Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687 (C.A. 2, 1973) 102, 116

Cases—Continued Page

H. K. Porter Company, Inc. v. *Nicholson File Co.*, 482 F.2d 421 (C.A. 1, 1973) 13, 85, 89, 102, 114-115, 118, 120, 137, 139-140, 149
Halsey Stuart & Co., 30 SEC 106 (1949) 178
Hawaii v. *Standard Oil Company of Cal.*, 405 U.S. 251 (1972) 140
Herzfeld v. *Laventhal, Kreckstein, Horwath & Horwath*, CCH Fed. Sec. L. Rep. ¶ 95,660 (July 15, 1976) 153, 189
Hiers v. *Cohen*, 329 A.2d 609 (Conn., 1973) 45
Hill York Corp. v. *American International Franchises, Inc.*, 448 F.2d 680 (C.A. 5, 1971) 142
Hughes v. *Securities and Exchange Commission*, 174 F.2d 969 (C.A.D.C., 1949) 194
Insuranceshares Corp. v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (E.D. Pa., 1940) 44
Intermountain Rate Cases, 324 U.S. 476 (1914) 21
Iroquois Indus., Inc. v. *Syracuse China Corp.*, 417 F.2d 963 (C.A. 2, 1969), certiorari denied, 399 U.S. 909 (1970) 93, 94
J. I. Case Co. v. *Borak*, 377 U.S. 426 (1964) .7, *et passim*
Jaffee & Co. v. *Securities and Exchange Commission*, 446 F.2d 387 (C.A. 2, 1971) 190
Janigan v. *Taylor*, 344 F.2d 781 (C.A. 1), certiorari denied, 382 U.S. 879 (1965) 18, 141-142
Jewelcor, Inc. v. *Pearlman*, CCH Fed. Sec. L. Rep. ¶ 95,096 (S.D. N.Y., 1975) 116
Johns Hopkins University v. *Hutton*, 297 F. Supp. 1165 (D. Md., 1968), affirmed in part, reversed in part, 422 F.2d 1124 (C.A. 4, 1970) 152
Kardon v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa., 1946) 90, 130
Klaus v. *Hi-Shear Corp.*, 528 F.2d 225 (C.A. 9, 1975) 118-119
Kors v. *Carey*, 39 Del. Ch. 47, 158 A.2d 136 (1960) 46, 72
Kramer v. *Scientific Control Corp.*, 365 F. Supp. 780 (E.D. Pa., 1973) 143

Cases—Continued Page

Leonard Duckworth, Inc. v. *Michael L. Field & Co.*, 516 F.2d 952 (C.A. 5, 1975) 45
Levy v. *Fernberg*, 29 N.Y.S. 2d 550 (N.Y. Sup. Ct., 1941) 44
Los Angeles Trust Deed & Mortgage Exchange v. *Securities and Exchange Commission*, 285 F.2d 162 (C.A. 9, 1960) 150
Lowenschuss v. *Kane*, 520 F.2d 255 (C.A. 2, 1975) .. 113, 140, 148-149
Mack v. *Mishkin*, 172 F. Supp. 885 (S.D. N.Y., 1959) 104
Marbury v. *Madison*, v *Cranch* 137, 5 U.S. 87 (1803) 78
Martin v. *American Potash Chem. Corp.*, 33 Del. Ch. 234, 92 A.2d 295 (1952) 46
Martin v. *Philips Petroleum Co.*, 445 S.W. 2d 429 (Ct. of Civ. App. of Tex., 1970) 45
In the Matter of Masland, Fernon & Anderson, 9 S.E.C. 338 (1941) 175
Matheson v. *Armbrust*, 284 F.2d 670 (C.A. 9, 1960) 152-153
McCloskey v. *Epco Shoes, Inc.*, 391 F. Supp. 1279 (E.D. Pa., 1975) 114
McClure v. *Borne Chemical Co.*, 292 F.2d 824 (C.A. 3, 1961) 153
Meisel v. *North Jersey Trust Co. of Ridgewood*, 216 F. Supp. 469 (S.D. N.Y., 1963) 142
Merrill Lynch, Pierce, Fenner & Smith v. *Ware*, 414 U.S. 117 (1973) 120
Mesa Petroleum Co. v. *Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex., 1976) 118-119
MGM, Inc. v. *Transamerica Corp.*, 303 F. Supp. 1344 (S.D. N.Y., 1969) 116
Middlesex Concrete, etc. v. *Carteret Indus. Ass'n.*, 181 A.2d 774 (N.J., 1962) 16
Miller v. *Steinbach*, 268 F. Supp. 235 (S.D. N.Y., 1967) 190

Cases—Continued

	Page
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	3, *et passim*
Mills v. *Sarjem Corp.*, 133 F. Supp. 753 (D. N.J., 1955)	43
Missouri Portland Cement Co. v. *Cargill, Inc.*, 498 F.2d 851 (C.A. 2), certiorari denied, 419 U.S. 883 (1974)	116
Myzel v. *Fields*, 386 F.2d 718 (C.A. 8, 1967), cetriorari denied, 390 U.S. 951 (1968)	141
Nagel v. *Prescott & Co.*, 36 F.R.D. 445 (N.D. Ohio, 1964)	142
National Railroad Passenger Corp. v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974)	15, 91, 133
Neuman v. *Electronic Specialty Co.*, CCH Fed. Sec. L. Rep. ¶ 92,591 (N.D. Ill., 1969)	114
New York Central Securities Corp. v. *United States*, 287 U.S. 12 (1932)	21
New York Department of Social Services v. *Dublino*, 413 U.S. 405 (1973)	129
Norte & Co. v. *Huffines*, 416 F.2d 1189 (C.A. 2, 1969), affirming, 304 F. Supp. 1096 (S.D.N.Y., 1968)	106, 110
Ohio Drill & Tool Co. v. *Johnson*, 498 F.2d 186 (C.A. 6, 1974)	106-107, 110
Orn v. *Eastman Dillon, Union Securities & Co.*, 364 F. Supp. 352 (C.D. Cal., 1973)	152
Otis & Co. v. *Pennsylvania, R. Co.*, 61 F. Supp. 905 (E.D. Pa., 1945), affirmed, 155 F.2d 522 (C.A. 3, 1946)	44
Otis Elevator Co. v. *United Technologies Corp.*, 405 F. Supp. 960 (S.D. N.Y., 1975)	116
Peffer v. *Bennett*, 523 F.2d 1323 (C.A. 10, 1975)	56
In re Penn Central Securities Litigation, 347 F. Supp. 1327 (E.D. Pa., 1972)	191
Perlman v. *Feldman*, 219 F.2d 713, certiorari denied, 349 U.S. 952 (1955)	44

Cases—Continued

	Page
Petersen v. *Federated Development Co.*, 387 F. Supp. 355 (S.D. N.Y., 1974)	114-115
Philips Chemical Co. v. *Hulbert*, 301 F.2d 747 (C.A. 5, 1962)	45
Phillips v. *Alabama Credit Corp.*, 403 F.2d 693 (C.A. 5, 1968)	152
Richardson v. *MacArthur*, 451 F.2d 35 (C.A. 10, 1971)	141
Richland v. *Crandall*, 262 F. Supp. 538 (S.D. N.Y., 1967)	155
Rondeau v. *Mosinee Paper Co.*, 422 U.S. 49 (1975)	15, *et passim*
Ronson Corp. v. *Liquifin Aktiengesellschaft*, 497 F.2d 394 (C.A. 3, 1974)	116
Rosenberg v. *Hano*, 121 F.2d 818 (C.A. 3, 1941)	193
Ross v. *Bernard*, 396 U.S. 531 (1970)	27
Sargent v. *Genesco*, 492 F.2d 750 (C.A. 5, 1974)	89, 118-120
Sarlie v. *E. L. Bruce Co.*, 265 F. Supp. 371 (S.D. N.Y., 1967)	192
Schaefer v. *First National Bank of Lincolnwood*, 326 F. Supp. 1186 (N.D. Ill., 1970), appeal dismissed, 465 F.2d 234 (C.A. 7, 1972)	142
Securities and Exchange Commission v. *Aldred Investment Trust*, 151 F.2d 254 (C.A. 1, 1945)	150
Securities and Exchange Commission v. *Bartlett*, 422 F.2d 475 (C.A. 8, 1970)	150
Securities and Exchange Commission v. *Bowler*, 427 F.2d 190 (C.A. 4, 1970)	150
Securities and Exchange Commission v. *Captial Gains Research Bureau, Inc.*, 375 U.S. 180 (1963)	77, 84
Securities and Exchange Commission v. *CINKE Int'l Corp., et al.*, (D. D.C.), SEC Lit. Rel. Nos. 5386 (Apr. 26, 1972) and 5465 (Jul. 17, 1972)	97
Securities and Exchange Commission v. *General Host*, 73-Civ-275 (S.D. N.Y.)	97

Cases—Continued

	Page
Securities and Exchange Commission v. *Gondleman*, 166 F. Supp. 429 (S.D. N.Y., 1958)	104
Securities and Exchange Commission v. *Healy*, 74 C-4305 (S.D. N.Y., 1974), SEC Litiation Rel. No. 6589 (Nov. 18, 1974)	39
Securities and Exchange Commission v. *Henwood*, Cal., 1961) CCH Fed. Sec. L. Rep. ¶ 95,125 (S.D. Cal., 1961), affirmed, 298 F.2d 641 (C.A. 9, 1962)	104, 105
Securities and Exchange Commission v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (C.A. 2, 1972)	150
Securities and Exchange Commission v. *Medic-Home Enteruprises, Inc.*, Civ. No. 75-6227 (S.D. N.Y.)	97
Securities and Exchange Commission v. *Mize, Civ.* No. 75-H-1420 (S.D. Tex.)	97
Securities and Exchange Commission v. *National Securities, Inc.*, 393 U.S. 453 (1969)	130, 149
Securities and Exchange Commission v. *Resch-Cassin & Co.*, 362 F. Supp. 964 (S.D. N.Y., 1973), appeal pending, Docket No. 73-2144 (C.A. 2)	190
Securities and Exchange Commission v. *Roussel, et al.*, Civ. Action No. 76-2571 (E.D. La.)	97
Securities and Exchange Commission v. *Roven*, Civ. No. 75-3413 (C.D. Cal.)	97
Securities and Exchange Commission v. *Scott Taylor & Co.*, 183 F. Supp. 904 (S.D.N.Y., 1959)	180
Securities and Exchange Commission v. *Sorg, Printing Co.*, CCH Fed. Sec. L. Rep. ¶95,034 (S.D. N.Y., 1975)	39
Securities and Exchange Commission v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (C.A. 2, 1968), certiorari denied, sub nom., *Coates* v. *Securities and Exchange Commission*, 394 U.S. 976 (1969)	131
Securities and Exchange Commission v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (C.A. 2, (1971)	150

Cases—Continued

	Page
Securities and Exchange Commission v. *Thermal Power Co.*, Civ. No. 75-2000 (LHB) (N.D. Cal)	97
Securities Investor Protection Corporation v. Barbour, 421 U.S. 412 (1975)	15, 77, 79, 106-107, 133
Simon v. *New Haven Bd. & Carton Co., Inc.*, 516 F.2d 303 (C.A. 2, 1975)	141-142
Smallwood v. *Pearl Brewing Co.*, 489 F.2d 579 (C.A. 5), certiorari denied, 419 U.S. 873 (1974)	114-115, 118, 120, 137
Sonesta International Hotel Corp. v. *Wellington Assoc.*, 483 F.2d 247 (C.A. 2, 1973)	13, 100, 116, 140
Spielman v. *General Host Corp.*, 402 F. Supp. 190 (S.D.N.Y., 1975), affirmed, Docket 75-7538, No. 710, slip opinion (C.A. 2, July 12, 1976)	114
Studebaker Corp. v. *Allied Products Corporation*, 256 F. Supp. 173 (W.D. Mich., 1966)	108
Studebaker Corp. v. *Gittlin*, 360 F.2d 692 (C.A. 2, 1966)	108
Superintendent of Insurance v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1972)	77-78, 84, 130
Surowtiz v. *Hilton Hotels Corp.*, 342 F.2d 596 (C.A. 7, 1965), reversed, 383 U.S. 363 (1966)	131-132, 191
Susskind v. *IPCO Hospital Supply Corp.*, 373 N.Y.S. 2d 627 (App. Div., 1975)	45
Swanson v. *American Consumers Indus., Inc.*, 475 F.2d 516 (C.A. 7, 1973)	106
Swinney v. *Keebler Co.*, 329 F. Supp. 216 (S.D. Cal., 1971), reversed, 480 F.2d 573 (C.A. 4, 1973)	44
T.I.M.E. Inc. v. *United States*, 359 U.S. 464 (1959)	91
Tcherepnin v. *Knight*, 389 U.S. 332 (1967)	77, 84
Texas & Pacific Ry. Co. v. *Rigsby*, 241 U.S. 33 (1916)	82
Texasgulf, Inc. v. *Canada Development Corp.*, 366 F. Supp. 374 (S.D. Tex., 1973)	116
Textron, Inc. v. *American Woolen Co.*, 122 F. Supp. 305 (D. Mass., 1954)	104
Thompson Ross Securities Co., 6 S.E.C. 1111 (1940)	178

Cases—Continued

	Page
Thrall Car Mfg. Co. v. *Rhodes, et al.*, C-2-76-605 (S.D. Ohio)	129
TSC Indus., Inc. v. *Northway, Inc.*, 96 S. Ct. 2126 (1976)	144-147, 194
Tucker v. *Arthur Anderson & Co.*, 67 F.R.D. 468 (S.D. N.Y., 1975)	142
Twentieth Century Fox Film Corporation v. *Lewis*, 334 F. Supp. 1383 (S.D. N.Y., 1971)	109
U.S. Smelting, Refining and Mining Co. v. *Clevite Corp.*, CCH Fed. Sec. L. Rep. ¶ 92,691 (N.D. Ohio, 1967)	111
Unicorn Field, Inc. v. *Cannon Group, Inc.*, 60 F.R.D. 217 (S.D. N.Y., 1973)	152
Union Pacific Railroad Company v. *Chicago and North Western Railway Co.*, 226 F. Supp. 400 (N.D. Ill., 1964)	10, 89, 110
United Industrial Corporation v. *Henwood*, CCH Fed. Sec. L. Rep. ¶ 91,142 (S.D. Cal., 1962)	104
United States v. *Brown*, 5 F. Supp. 81 (S.D.N.Y., 1933), affirmed, 79 F.2d 321 (C.A. 2), certiorari denied, sub nom. *McCarthy* v. *United States*, 296 U.S. 650 (1935)	164
United States v. *Charnay*, CCH Fed. Sec. L. Rep. ¶ 95,560 (C.A. 9, 1976), petition for rehearing en banc denied (July 8, 1976)	153
United States v. *Republic Steel Corp.*, 362 U.S. 482 (1960)	80
Universal Container Corp. v. *Slade*, CCH Fed. Sec. L. Rep. ¶ 93,005 (S.D.N.Y., 1971)	109
Washburn v. *Madison Square Garden Corp.*, 340 F. Supp. 504 (S.D.N.Y., 1972)	121
Water & Wall Assoc., Inc. v. *American Consumer Indus., Inc.*, CCH Fed. Sec. L. Rep. ¶ 93,943 (D.N.J., 1973)	109
Wegman v. *Dairylea Corp., Inc.*, 376 N.Y.S. 2d 728 (App. Div., 1975)	45
Weitzen v. *Kearns*, 271 F. Supp. 616 (S.D. N.Y., 1967)	180
In the Matter of White & Weld, 3 S.E.C. 466 (1938)	172

Cases—Continued

	Page
Wilko v. *Swann*, 127 F. Supp. 55 (S.D. N.Y., 1955)	152
Wolf v. *Frank*, 477 F.2d 467 (C.A. 5), certiorari denied, 414 U.S. 1065 (1973)	141-142
Wolfson v. *Parkway Management Co.*, CCH Fed. Sec. L. Rep. ¶ 91,967 (S.D. N.Y., 1967)	193
Wulc v. *Gulf & Western Indus., Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,361 (E.D. Pa., 1975)	122
Wyandotte Co. v. *United States*, 389 U.S. 191 (1967)	78-80, 91
Yakus v. *United States*, 321 U.S. 414 (1944)	21

Statutes and Rules:

Securities Act of 1933, 15 U.S.C. 77a, *et seq.*:	
Section 11, 15 U.S.C. 77k	41, *et passim*
Section 12, 15 U.S.C. 77*l*	75, 142, 151, 154, 161
Section 12(2), 15 U.S.C. 77*l*(2)	136, 139, 142, 151, 156
Section 15, 15 U.S.C. 77o	75, 151
Section 17(a), 15 U.S.C. 77g(a)	65
Section 22(a), 15 U.S.C. 77v(a)	136
Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*:	
Section 2, 15 U.S.C. 78b	21, 76, 165
Section 9, 15 U.S.C. 78i	18, *et passim*
Section 10(b), 15 U.S.C. 78j(b)	18, *et passim*
Section 12, 15 U.S.C. 78*l*	96
Section 13, 15 U.S.C. 78m	58
Section 13(d), 15 U.S.C. 78m(d)	42, 83, 95-96
Section 13(d)(1), 15 U.S.C. 78m(d)(1)	42, 83, 118
Section 13(e), 15 U.S.C. 78m(d)	67, 68
Section 14, 15 U.S.C. 78n	58, 94
Section 14(a), 15 U.S.C. 78n(a)	6, *et passim*
Section 14(d), 15 U.S.C. 78n(d)	42, 95, 96, 116
Section 14(d)(4), 15 U.S.C. 78n(d)(4)	11, 61-63, 88, 101
Section 14(d)(5), 15 U.S.C. 78n(d)(5)	99

Statutes and Rules—Continued Page

Section 14(d)(6), 15 U.S.C. 78n(d)(6) ..60, 99, 138
Section 14(e), 15 U.S.C. 78n(e) .....2, *et passim*
Section 14(f), 15 U.S.C. 78n(f) 42
Section 15(c)(1), 15 U.S.C. 78o(c)(1) 65, 174
Section 16, 15 U.S.C. 78p 56, 75, 87, 91
Section 18, 15 U.S.C. 78r 75, 91
Section 20, 15 U.S.C. 78t 75
Section 21, 15 U.S.C. 78u 104
Section 27, 15 U.S.C. 78aa 80, 103, 113
Section 28(a), 15 U.S.C. 78bb(a) 75, 141, 148-149, 151, 154

Rules under the Securities Exchange Act of 1934:

Rule 10b-5, 17 CFR 240.10b-5 .....17, *et passim*
Rule 10b-6, 17 CFR 240.10b-6 .....19, *et passim*
Rule 10b-7, 17 CFR 240.10b-7 .....176-177, 179
Rule 10b-8, 17 CFR 240.10b-8 .....176-177, 179
Rule 10b-13, 17 CFR 240.10b-13 .....39, 184, 188
Rule 14a-9, 17 CFR 240.14a-9 .....17, 65, 144, 155
Rule 15c-1, 17 CFR 240.15c-1 65
Rule 15c-2, 17 CFR 240.15c-2 65

Schedules:

Schedule 13D, 17 CFR 240.13d-101 .....95, 118
Schedule 14D, 17 CFR 240.14d-101 95

State Statutes:

Alaska Stat. § 45.571.010 (1976) *et seq.* 126, 127
Colo. Rev. Stat. Ann. § 11-51-5-105 (1975) 127, 128
Conn. Gen. Stat. Rev. § 38-68(d) (1976) 127
Del. Code Ann. Title 8 § 203(c)(2) (1976) 126
Hawaii Rev. Stat. § 417-E *et seq.* (1974) 126, 127, 128
Idaho Code § 30-1504(1) (1975) 127
Ind. Code § 23-2-3-1 et seq. (1971) 127, 128
Kan. Stat. Ann. § 17-1276 (1976) 126, 128
Ky. Rev. Stat. Ann., eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 20,131, 20,136) 126, 128

Statutes and Rules—Continued Page

Md. Ann. Code, Art. 9, § 11-901 *et seq.* (1976) 126, 127, 128
Mass. Gen. Laws Ann. Ch. 110C (1976) 127, 128
Mich. Comp. Laws § 17 (1976) 128
Minn. Stat. Ann. § 80B.01 *et seq.* (1973) 127, 128
Nev. Rev. Stat. § 78,376 *et seq.* (1973) 126, 128
N.Y. Bus. Corp. Law § 1600 (1976) 125
Ohio Rev. Stat. Ann. § 107.041 *et seq.* (1973) 126, 127, 128
Pa. Stat. Ann., eff. Mar. 3, 1976 (2 Blue Sky L. Rep. ¶ 41,183-41,193) 126, 127, 128
S.D. Comp. Laws Ann. § 47-32-1 *et seq.* 127
Tenn. Code Ann. § 48-2101 *et seq.* (1976) 126, 127, 128
Utah Code Ann.; eff. Feb. 5, 1976 (3 Blue Sky L. Rep. ¶ 47,331-47,345) 127, 128
Va. Code Ann. § 13-1-528 *et seq.* (1973) 125, 126, 127, 128
Wis. Stat. § 552.01 *et seq.* (1973) 127, 128

Legislative Material:

Bills:

S. 510 .....57, *et passim*
S. 2731 .....56, 57, 58, 61

Hearings:

Senate Committee on Banking and Currency, Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.), pt. 15, National Securities Exchange Act of 1934, 73d Cong., 1st Sess. (1934) 77
Senate Committee on Banking and Currency, Hearings on Stock Exchange Practices, 73d Cong., 1st Sess. (1934) 170, 173
Senate Committee on Banking and Currency, Hearings before a Subcommittee of the Committee on Banking and Currency on S. 879, 84th Cong., 1st Sess. (1956) 48, 101, 112
House Committee on Interstate and Foreign Commerce, Hearings on H.R. 6789, H.R. 6793, S. 1642, 88th Cong., 1st and 2d Sess. (1964) 48

Legislative Material—Continued Page

Senate Committee on Banking and Currency, Hearings Before the Subcommittee on Securities on S. 510, 90th Cong., 1st Sess. (1967) ..... 7, *et passim*
House of Representative Committee on Interstate and Foreign Commerce, Hearings Before the Subcommittee on Commerce and Finance on H.R. 14475, S. 510, 90th Cong., 2d Sess. (1968) ..... 24, *et passim*
Senate Committee on Banking, Housing and Urban Affairs, Hearings on Corporate Takeovers, 94th Cong., 2d Sess., (Feb. 16, 1976) 23, 35, 37, 129

Reports:

H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) 75, 165
H.R. Rep. No. 152, 73d Cong., 1st Sess. (1933) 75
H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 75, 165
H.R. Rep. No. 2508, 82d Cong., 2d Sess. (1952) 177
H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968) 8, 42, 49, 59, 73, 88, 138
S. Rep. No. 47, 73d Cong., 1st Sess. (1933) 75
S. Rep. No. 792, 73d Cong., 2d Sess. (1934) 18, 164, 170-171
S. Rep. No. 1455, 73d Cong., 2d Sess. (1934) .. 6, 48, 83, 109, 164, 167-168, 172, 192
S. Rep. No. 550, 90th Cong., 1st Sess. (1967) .. 8, 42, 49, 59, 73, 88, 99, 138, 155

Debates:

111 Cong. Rec. 28257-28259 (1965) 55, 56
112 Cong. Rec. 19003-19007 (1966) ..... 10, *et passim*
113 Cong. Rec. 854-857 (1967) 57, 60, 67, 68-70
113 Cong. Rec. 9340 (1967) 85

Legislative Material—Continued Page

113 Cong. Rec. 24664 (1967) 53, 84-85
116 Cong. Rec. 29252 (1970) 24

Documents:

Securities and Exchange Commission, 37th Annual Report (1971) 25
Securities and Exchange Commission, 41st Annual Report (1975) 25
Report of the Securities and Exchange Commission, Institutional Investor Study, H.R. Doc. No. 92-64, 92d Cong., 1st Sess. (1971) 32, 185
Securities and Exchange Commission, Report on Proposals for Amendments of the Securities Act of 1933 and the Securities Exchange Act of 1934, Comm. Print, 77th Cong., 1st Sess. (1941) 18, 166

Releases:

Securities Act Release No. 5731 (1976) 33, 85-86
Securities Exchange Act Release No. 2363 (1940) 175
Securities Exchange Act Release No. 2446 (1940) 169, 176
Securities Exchange Act Release No. 4163 (1948) 176
Securities Exchange Act Release No. 5040 (1954) 177
Securities Exchange Act Release No. 5159 (1955) 178
Securities Exchange Act Release No. 5194 (1955) 178
Securities Exchange Act Release No. 8595 (1969) 188
Securities Exchange Act Release No. 8712 (1969) 184

Miscellaneous Statutes:

18 U.S.C. § 610 134
Regulation X-9A6-1 175-176

Miscellaneous:

American Law Institute, *Federal Securities Code*, (1974) 81
American Law Institute, *Restatement of Torts* 2d (1965) 45, 78
Anisman, *Takeover Bid Legislation in Canada* (1974) 29
Aranow & Einhorn, *Tender Offers for Corporate Control* (1973) 26, 34, 36, 98
Aranow & Einhorn, *Proxy Contests for Corporate Control*, (2d ed., 1968) 22-23
Austin, *Tender Offers Revisited*, 8 Mergers & Acquisitions, 16 (Fall, 1973) 21-22, 25
Austin, *Tender Offer Statistics*, 10 Mergers & Acquisitions, 9 (Fall, 1975) 25
Austin & Fishman, *Corporations in Conflict—The Tender Offer* (1970) 25, 31, 34, 44
Baer & Sifka, *Does Arbitrage Create Institutional Opportunities?* 1 Institutional Investor 24 (April 1967) 36
Berle, *Liability for Stock Market Manipulation*, 31 Col. L. Rev. 264 (1931) 164, 167
Berle, *Stock Market Manipulation*, 38 Col. L. Rev. 393 (1938) 164
Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569 (1973) 19, 42-43, 57, 63-64, 180
Blair & Co., *The Strategy of Tender Socilitation* (1967) 25
Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 459 (1969) 22, 42-43, 63-64, 137
Bromberg, *Tender Offers: Safeguards and Restraints—An Interest Analysis*, 21 Case W. Res. L. Rev. 613 (1970) 34

Miscellaneous—Continued

Page

Brown, *Corporate Defenses to Takeover Bids*, 44 Tul. L. Rev. 517 (1970) 34
Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 Harv. L. Rev. 297 (1974) 28
Cary, *Corporations*, (4th ed., 1969) 25
Cary, *Corporate Devices Used to Insulate Management from Attack*, 25 Bus. Law 339 (1970) 34
Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377 (1969) 23, 42-43, 57
Cohen, *Tender Offers and Takeover Bids*, 23 Bus. Law 611 (1968) 26, 60
Note, *Commerce Clause Limitation Upon State Regulation of Tender Offers*, 47 So. Cal. L. Rev. 1133 (1974) 129
Comyn's Digest (1762) 78
Conard, *Corporations in Perspective* (1976) 27
Note, *Current Problems Under the Securities Acts —The Expanding Use of Rule 10b-5*, 10 B.C. Ind. & Com'l. Rev. 313 (1969) 43
Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250 (1973) 23, 42, 43, 63, 138
Evans, *Arbitrage in Domestic Securities in the United States* (1965) 36
Fairer Deal for All in Takeovers Is the Aim, The Times (of London), Sept. 6, 1967 71
Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317 (1967) 22, 24, 26, 32, 42, 45, 93, 100
Flom, Lipton & Steinberger, *Takeovers and Takeouts—Tender Offers and Going Private* (Law Jl. Pr., 1976) 28, 29, 98, 100
Foshay, *Market Activities of Participants in Securities Distribution*, 45 Va. L. Rev. 907 (1959) 188
Graham, Dodd & Cottle, *Security Analysis: Principles and Technique* 408 (4th ed., 1962) 4

Miscellaneous—Continued Page

Halpern, *Intentional Torts and the Restatement*, 7 Buff. L. Rev. 7 (1952) 45
Hamilton, *Corporations*, 549 (1976) 57
Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269 (1969) ...22, 26, 30, 42-43, 63-64, 137-138
Harper & James, *The Law of Torts*, Vol. 1 (1950).. 46
Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135 (Mar.-Apr. 1967) 25, 28, 33-34, 43
Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466 (1971) 36-37
Herlands, *Criminal Law Aspects of the Securities Exchange Act of 1934*, 21 Va. L. Rev. 139 (1934) 172
Hickernell, *What Makes Stock Market Prices*, 127 (1932) 192
Hill, *The Sale of Controlling Shares*, 70 Harv. L. Rev. 986 (1957) 44
Hirsch & Lewis, *Punitive Damages Under the Federal Securities Acts*, 47 Notre Dame L. Rev. 72 (1971) 142-143
Huge Profits Out of Tiny Margins, Bus. Week, May 28, 1966 35
Israels, *Corporate Purchase of Its Own Shares—Are These New Overtones*, 50 Cornell L. Q. 620 (1965) 46
Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778 (1952) 27
Jennings, *Trading in Corporate Control*, 44 Cal. L. Rev. 1 (1956) 44
Kennedy, *Tender Moment*, 23 Bus. Law. 1091 (1968) 44, 93
Lee, *Tender Offer Defense, How to Short Circuit the Corporate Raider*, 10 Mergers & Acquisitions 4 (Fall, 1975) 33
Leech, *Transactions in Corporate Control*, 104 U. Pa. L. Rev. 725 (1956) 44

Miscellaneous—Continued Page

Loss, *The Role of Rule 10b-5in Tender Offers*, Securities Regulation and Transfer Report (Special Report, Jan., 1969) 43
Loss, *Securities Regulation* (2d ed., 1961) 48, 64, 172-176, 192
Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 Duke L.J. 231 (1967).. 24, 27
Comment, *Market Manipulation and the Securities Exchange Act*, 46 Yale L.J. 624 (1937) 166, 192
Mathias, *Manipulative Practices and the Securities Exchange Act*, 3 U. of Pitt. L. Rev. 7 (1934) 166
Moore & Wiseman, *Market Manipulation and the Exchange Act*, 2 U. of Chi. L. Rev. 46 (1934).... 129
Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687 (1975) 63
Mundheim, *Tender Offers*, 2 Rev. of Securities Regulation 953 (1969) 38, 40-41
Mundheim, et al., ed. *Sixth Annual Institute on Securities Regulation* P.L.I. (1975) 44
Note, 19 Chi.-Kent L. Rev. 193(1941) 44
Note, 26 Cornell L. Q. 325 (1941) 44
Note, 54 Harv. L. Rev. 648 (1941) 44
Note 25 Minn. L. Rev. 335 (1941) 44
Note, 27 Va. L. Rev. 546 (1941) 44
O'Boyle, *Changing Tactics in Tender Offers*, 25 Bus. Law. 863 (1970) 35
Prosser, *The Law of Torts* (4th ed., 1971) 45, 46
Note, *The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5*, 33 U. Chi. L. Rev. 359 (1966) 23, 42
Comment, *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509 (1947) 164, 166, 169, 171-172
Ruder, *Texas Gulf Sulphur—The Second Round*, 63 N.W.L. Rev. 423 (1968) 151
Ruthlessness by the Rules, 117 Forbes 24 (Feb. 1, 1976) 25, 33, 36

Miscellaneous—Continued Page

Schmults & Kelley, *Cash Takeover Bids—Defensive Tactics*, 23 Bus. Law. 115 (1967) 25, 33, 34
Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon*, 5 Harv. J. Legis. 431 (1968) 93
Takeover Bids: Proceedings of Meeting Held in Lloyd's Writing Room, London on Tuesday, 20 July 1971, 27 Bus. Law. 243 (1971) 28
The Takeover Titans, 85 Finance 8 (August, 1967) 30, 33
Taussig & Hayes, *Are Cash Take-Over Bids Unethical?* Financial analysts J. 107 (Jan.-Feb. 1967) 34
Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 217 (1914) 78
Troubh, *Purchased Affection: A Primer on Cash Tender Offers*, 54 Harv. Bus. Rev. 79 (Jul.-Aug., 1976) 31, 38-40
Twentieth Century Fund, Inc., *The Securities Markets*, 478 (1935) 167
Vorys, *Ohio Tender Offer Bill*, 43 Ohio Bar J. 65 (1970) 125
Wall Street Journal, Feb. 26, 1969 30
Weiss & Liebowitz, *Rule 10b-6 Revisited*, 39 Geo. Wash. L. Rev. 474 (1971) 180
Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700 (1970) 23, 57, 138
Yoran, *Advanced Defensive Ttactics Against Take over Bids*, 21 Am. J. Comp. L. 531 (1973) 32

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-353

HOWARD PIPER, ET AL., PETITIONERS

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

No. 75-354

THE FIRST BOSTON CORPORATION, PETITIONER

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

No. 75-355

BANGOR PUNTA CORPORATION, ET AL., PETITIONERS

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

The Securities and Exchange Commission files this brief, *amicus curiae*, to express its views on the effects the resolution of the questions addressed by the parties will have on the Commission's administration of the federal securities laws.

QUESTIONS ADDRESSED

The Securities and Exchange Commission will discuss the following specific questions: [1]

1. Whether a private right of action should be implied under Section 14(e) of the Securities Exchange Act on behalf of a competing tender offeror against those who made misleading statements during the course of a tender offer contest.

2. To what extent, and in accordance with what principles, should the relief to be granted in such an action be limited by either the express statutory language of Section 14(e) or the express limitations on liability imposed by the Securities Act of 1933.

---

[1] We express no views concerning the numerous questions of fact presented by the parties herein. For example, we take no position regarding whether the violations claimed caused the injury complained of and whether that injury has properly been shown, how liability should be apportioned among the defendants, and whether the computation of damages by the court of appeals adequately compensated the respondent for its loss. Our concern, in sum, is with the proper principles to be applied to the questions that this case presents rather than with the manner in which the factual issues are resolved.

3. Whether Securities Exchange Act Rule 10b-6 is violated where a tender offeror engaged in a distribution of its own shares purchases securities which represent a right to purchase the shares which are the subject of the distribution, and, whether a private right of action exists to remedy such a violation of the Rule.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is responsible for the administration and enforcement of the Securities Exchange Act of 1934, of which the Williams Act and the rules thereunder are an important part. While the Commission has no specific interest in the precise outcome of the litigation between the parties before this Court, the issues presented involve the application and scope of private actions for violations of the Williams Act which, as this Court has observed with respect to comparable issues under the proxy provisions of the Securities Exchange Act, may have a profound effect on the Commission's ability to enforce the statutory obligations imposed by that Act, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

INTRODUCTION

This action arises out of a contest for corporate control of Piper Aircraft Corporation ("Piper"). As the target company, Piper management's first inclination was to stave off any change in control. Ulti-

mately, however, Piper was the subject of two competing tender offers. The first offer was inspired by external market forces and factors, and it was made by Chris-Craft Industries, Inc. ("Chris-Craft"). The second offer, made by Bangor Punta Corporation ("Bangor Punta"), was facilitated by First Boston Corporation ("First Boston"), Piper's financial adviser, and generated, apparently, by Piper management's concern, and that of the Piper family, that the inexorable destruction of Piper's independent corporate status (started by Chris-Craft's offer) should, at the least, occur at the hands of a suitor which was aided, comforted, materially assisted by, and thus, beholden to, Piper's management.

In the seven years since this litigation commenced, it has become a textbook classic on the broadranging issues and interests both raised and affected by the device of a contested tender offer, and has served as a model for the courts and practitioners alike in establishing and resolving the obligations and responsibilities of participants in tender offers. The practical lessons to be learned from court decisions like the three rendered in the court below cannot be overstated. For, as a respected textbook on security analysis has noted, "Wall Street has never paid much attention to theoretical thinking." Graham, Dodd & Cottle, *Security Analysis: Principles and Technique* 408 (4th ed., 1962).

Accordingly, and "for whatever reasons, * * * the present day's continuing saga of corporate warfare has brought before this Court what may appro-

priately be termed an epic battle." [2] Chris-Craft, the loser in the struggle for control of Piper, has been the winner in the litigation that ensued. Bangor Punta, the victorious combatant, was found to have violated the federal securities laws in winning corporate control of Piper and has been a loser in this litigation. The Piper family and First Boston, the allies of Piper and Bangor Punta, also found that being on the victorious side did not necessarily ward off extensive liability for the violations of federal law that facilitated Bangor Punta's successful campaign.

SUMMARY OF DISCUSSION

1. In 1968, one year before the events in issue here first commenced, Congress enacted the Williams Act [3]—comprehensive and pervasive legislation vesting in the Securities and Exchange Commission ("Commission") broad rulemaking authority to establish normative standards of conduct to govern the rights and obligations of the participants in, and those persons affected by, tender offers.

Prior to 1968, there was little regulation of tender offers. The Securities Act of 1933 did require registration of securities offered in tender offers which involved exchanges of securities, but did not apply to

---

[2] *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579, 583 (W.D. Pa., 1975).

[3] Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454.

cash tender offers. Neither state statutes nor the common law provided effective relief. Thus, tender offer campaigns were waged without substantial regulation or control and often without regard to fairness, the accuracy of the information provided to security holders, or the orderliness of the securities markets. This was in sharp contrast to the comprehensive federal regulation of proxy contests, where rules had been adopted by the Commission pursuant to authority it had had since 1934 under Section 14(a) of the Securities Exchange Act. Those rules were designed to implement the congressional intent to protect against "promiscuous solicitation of * * * proxies, on the one hand, by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious corporation officials; and, on the other hand, by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting the facts." [4]

The Williams Act was designed to regulate tender offers and remedy the significant abuses that had developed. The secrecy in which the takeover process was enshrouded, the lack of adequate disclosure and antifraud requirements, and the pressure on each person affected by the process to act hastily without adequate information were all matters of concern to the Congress. And, the Congress found that the contestants sometimes engaged in other tactics that un-

[4] S. Rep. No. 1455, 73rd Cong., 2d Sess. 77 (1934).

dermined the confidence of the public in the integrity of the securities markets, including actual market manipulation.

The Williams Act, accordingly, was drafted to fill the regulatory gap by establishing a comprehensive scheme of regulation comparable to that which governed proxy contests. Congress noted that tender offers were "typically alternatives to proxy solicitations, as methods of capturing or preserving control," [5] and patterned the protections afforded by the Williams Act on the existing proxy regulation provisions of the Securities Exchange Act.

The antifraud provisions of the Williams Act were applied to all securities without regard to registration, and Congress substantially wrote into the law with respect to tender offer contests the Commission's broad proxy and antifraud rules. Section 14(e) of the Williams Act, for example, specifically bars any person from engaging in manipulative acts or practices.

The legislative history of the Williams Act shows that Congress intended to protect all persons interested in, or affected by, tender offers. While stressing

[5] Senate Committee on Banking and Currency, *Hearings Before the Subcommittee on Securities on S. 510*, 90th Cong., 1st Sess. 16, 33 (1967) (hereinafter "Senate Hearings").

the need to protect the shareholders of the target corporation, the legislative history shows that Congress was also concerned with the need to protect and to place on an equal footing all participants in the marketplace, including those who make the tender offers, those who oppose them, the target company's current stockholders, and potential investors. All of them were not only to have available all material information, but also the assurance that the contest would be fair. Care was taken to provide an equal opportunity both to the insurgents and to the entrenched to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." [6] In short, it was deemed as important as protecting management against unfair raiding attempts that incumbent management should not have the ability to "frustrate an attractive and desirable tender offer." [7]

2. The Williams Act creates the same "pervasive legislative scheme governing the relationship between * * *" the broad range of persons interested in, and interests affected by, tender offerors as this Court repeatedly has found to exist in the area of proxy regulation. *Cort* v. *Ash*, 422 U.S. 66, 82 (1975); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). In *Borak*, this Court found that the need, justification and authority for implied remedies under the Securities

[6] S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

[7] Senate Hearings, pp. 184, 186.

Exchange Act is "clear," 377 U.S. at 430. The appropriateness of implying private remedies stems in part from Section 27 of the Act which, as *Borak* pointed out, "specifically grants the appropriate district courts jurisdiction over 'all suits in equity and actions at law to enforce any liability or duty created under the Act.' " *Id.*, at 430-431. It stems as well from the long accepted concept that a person for whose benefit a statute was enacted should have a remedy for a violation by which he has been injured. On that basis, standing should be accorded to defeated offerors who seek to vindicate the requirements and provisions of the Williams Act.

But, even if this Court's decision in *Borak* were not dispositive of the appropriateness of implying private remedies for thwarted tender offerors, the four factors this Court recently specified in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), as "relevant" in "determining whether a private remedy is implicit in a statute not expressly providing one * * *," militate in favor of implying a private remedy here.

The first factor specified in *Cort* v. *Ash* is that the plaintiff be " 'one of the class for whose *especial* benefit the statute was enacted,' * * * that is, [that] the statute grant a federal right in favor of the plaintiff." [8] This depends upon whether there is "generally" either (1) a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," or (2)

[8] *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) (emphasis in original).

"a clearly articulated federal right in the plaintiff." *Id.*, at 82. A tender offeror seeking to enforce a violation arising under Section 14(e) meets both of these tests. The Williams Act provides sweeping protections for the contestants in a take-over battle, including tender offerors, as well as for the shareholders of the target corporation. Thus, Section 14(e) provides protections against what the Commission described as

> "dissemination of inaccurate *or* incomplete information *or* fraudulent acts *or* practices by persons who make or invite tender offers *and* [to] affor[d] a more practical means of preventing inaccurate *or* incomplete presentations *or* fraudulent acts *or* practices by persons opposing or favoring such tender offers".[9]

The "clearly articulated federal right in the plaintiff" [10] is created by the Williams Act in favor of each of the participants in a contest for control including tender offerors. Just as after *Borak*, the courts have concluded that a proxy contestant has "a genuine interest" [11] in assuring that its efforts would not be thwarted by the "prohibited" conduct of a rival, so here a tender offeror has an equally "genuine interest" in assuring that its success is not blocked by

---

[9] 112 Cong. Rec. 19003 (1966) (emphasis supplied).

[10] 422 U.S. at 82.

[11] *Union Pacific Railroad Co.* v. *Chicago and North Western Railway Co.*, 226 F.Supp. 400, 406 (N.D. Ill., 1964).

violations of the Williams Act. Certainly the specific references in favor of tender offerors in Sections 14(d)(4) and 14(e) of the Act—establishing requirements of fairness and honesty for persons opposing tender offers—support the ample evidence of a Congressional intent to protect tender offerors.

A second relevant factor that has been employed by this Court to imply a cause of action, as set forth in *Cort*, is whether there is "any indication of legislative intent, explicit or implicit, either to grant such a remedy or deny one." [12] This Court there pointed out, 422 U.S. at 82 (emphasis in original), that:

> "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such [a] cause of action would be controlling."

Not only is there no legislative history that can be cited as evidencing "an explicit purpose to deny" [13] a cause of action to participants in tender offers, but the legislative history of the Williams Act indicates that Congress was aware of the need for such private remedies, and that, in enacting the broad and inclusive proscriptions of Section 14(e), comparable to language in the Commission's proxy rules, Congress was aware that such language had been the basis for implying private actions on behalf of the

---

[12] *Cort* v. *Ash*, *supra*, 422 U.S. at 82.

[13] *Id.*, at 78.

various persons participating in, or affected by, proxy contests.

A third test set forth in *Cort* is whether it is "consistent with the underlying purposes of the legislative scheme to imply * * * a remedy for the plaintiff." [14] In *Borak*, this Court emphasized that a private right of action was a necessary supplement to Commission action to make effective the Congressional purposes of the proxy provisions. Even more necessary are such private rights of action to supplement Commission actions to effectuate the Congressional purposes in enacting the Williams Act.

The number of tender offers has been rapidly increasing, and the economic, business and methodological complexities of tender offers need closer attention than even the most vigilant government agency can hope to provide within the brief time of a contested tender offer. Proxy statements must be submitted for staff review and comment before a formal "filing" is made, but the Williams Act provides no opportunity for the Commission to examine materials before requests or invitations for tenders are made to offerees, and the contest can be won or lost within a matter of days. In view of the extreme care employed by Congress to avoid tipping the scales in favor of either side, only where there are flagrant violations is the Commission likely to bring court action against one side or the other, since this in itself might tend to be an important consideration to the stockholders solic-

[14] *Id.*

ited. Moreover, rarely is the Commission in a position to take court action before it is not already too late to "unscramble the eggs." [15] On the other hand, the contestants who have a significant economic stake in the manner in which the contest is conducted also have the greatest "incentive to detect violations and vigorously pursue remedies," [16] all in furtherance of the purposes of the Act.

In *Borak*, 377 U.S. at 433, this Court pointed to the "duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional 'purpose,' " and struck down artificial barriers that might have interfered with meaningful relief. In light of *Borak* and subsequent cases implying causes of action under the proxy rules for all participants in proxy contests, the courts have similarly implied causes of actions under the Williams Act for all participants in tender offers—the target company's shareholders, the target company and competing tender offerors.

A fourth and final relevant factor set forth in *Cort* is whether the cause of action is one "traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action based solely on federal law." [17]

[15] *Sonesta International Hotel Corp.* v. *Wellington Assoc.*, 483 F.2d 247, 250 (C.A. 2, 1973).

[16] *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (C.A. 1, 1973).

[17] *Cort* v. *Ash, supra,* 422 U.S. at 78.

The Williams Act, as this Court held was true of the proxy provisions involved in *Borak*, is "clearly an intrusion of federal law into the internal affairs of corporations * * *" and the affairs of those seeking to engage in contests of corporate control. *Cort* v. *Ash*, 422 U.S. at 85. Committing a tender offeror to state-provided remedies, if any, "might well prove insuperable to effective relief." *Cf.*, *Borak*, *supra*, 377 U.S. at 434-435. State laws are often inconsistent with the purposes of the Williams Act. The jurisdictional scope for state actions may be too narrow to be effective. Procedural protections in state courts for the tender offeror are more imaginary than real. State remedies are generally inadequate. The real policy behind some state statutes appears to be to perpetuate local management and to induce incorporation in those states rather than risking tender offers which may lead to the ousting of management. Hence, even more than with respect to the proxy violations, it is entirely inappropriate to relegate tender offerors to state laws where the Williams Act has been violated by their opponents.

3. Over the last thirty years, the federal courts, encouraged by the decisions of this Court, consistently have implied private actions for those whom the federal securities laws were "designed to protect." [18] Of late, however, the utilization of private remedies to satisfy damages sustained as a result of illegal conduct has caused this Court to consider whether, and

[18] *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970).

to what extent, limitations should be imposed on implied private actions. That consideration has led this Court to conclude that, just as the federal courts may imply federal remedies under the federal securities laws, so too may they imply limitations on those remedies.

But, since implied private actions under the federal securities laws "vindicat[e] the statutory policy * * *," and provide "an important means of enforcement of the * * *" statute, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970), "resolving doubts in favor of those the statute is designed to protect * * *" shows that the strong public policy considerations supporting the implication of private actions under the federal securities laws should only be balanced against competing policy considerations of equal strength.

Such an analysis suggests that limitations on implied private remedies should be "consistent with the legislative scheme" [19] and should not impede or frustrate the purposes which the statutory provisions involved, and the private remedy implied thereunder, seek to effectuate. Similarly, in giving content to the Congressional policies in the Act, implied private remedies should be delimited in a manner consistent with the express language of the provision of the Act

[19] *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 62 (1975); *Cort* v. *Ash*, *supra*, 422 U.S. at 78; *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-461 (1974); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423-424 (1975).

pursuant to which a private action has been implied. Where neither the express language nor the Congressional intent underlying the sections of the Act involved give clear guidance, limitations imposed on implied private actions should conform to the "bounds [Congress] delineated for *comparable* express causes of action." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975) (emphasis supplied).

These principles have their most important application in assessing the relief to be granted in a private suit, once a violation of the law has been established. To effectuate the purposes of the Act, the manner in which damages are calculated should both implement the statutory scheme, and not cause undue disruption in the methods by which those persons who are regulated under the Act carry out their normal business activities. Thus, if damages are denied in the face of truly violative conduct, or are otherwise inadequate where real injury has been suffered, so as to diminish the likelihood that bona fide private lawsuits will be brought, or conversely, if damages are computed in a Draconian fashion, the Congressional purposes underlying the federal securities laws will not be effectuated.

In the instant case, the Commission, as a government agency, is concerned solely with the principles applied in arriving at an award of damages, not the amount of damages that may in fact be awarded. The Commission must rely on private parties to "supplement" its own enforcement of the federal securities laws, and the performance of this function is

assured if damages are awarded in an amount sufficient to compensate an injured party for the full extent of its loss caused by the defendants. Of course, where the Commission institutes its own enforcement action, its success in obtaining remedies ancillary to the award of an injunction should be considered by the courts to determine whether the judgment obtained by the Commission can restore private party plaintiffs to their status quo ante, or otherwise make them whole for any injury suffered. In such a case, the award of damages to a prevailing plaintiff would be inappropriate.

Section 14(e) of the Securities Exchange Act proscribes misleading, as well as fraudulent, statements in connection with tender offers, and does not present the Court with a statute designed solely to proscribe knowing violations of the law. Instead, Section 14(e), like Rules 10b-5 and 14a-9, after which it was patterned, should be "read as proscribing * * * any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not." *Cf. Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375, 1390 (1976). But, persons injured solely by virtue of merely negligent conduct in derrogation of Section 14(e), particularly if that conduct should occur in connection with misleading statements in a registration statement, should be compensated by analogy to the remedies expressly provided in the Securities Act for misleading statements in the sale of securities. On the other hand, the public policy in

restoring injured parties to their prior status is greater where they are the victims of knowing wrongdoing. In such a circumstance, they should be compensated for their actual damages, including all those sustained as a consequence of the defendants' wrongdoing. See, *e.g.*, *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972); *Janigan* v. *Taylor*, 344 F. 2d 781, 786 (C.A. 1), *certiorari denied*, 382 U.S. 879 (1965).

4. "The very heart of the [Securities Exchange] Act" [20] is its proscriptions against manipulative devices. Those proscriptions, contained in part in Sections 9(a) and 10(b) of the Act, were enacted in 1934, to counteract the broad abuses Congress had seen in its intensive study of stock market practices. Many of the manipulative practices Congress isolated and identified served "no legitimate function," [21] except the unjust enrichment of the perpetrators of such acts, and thus were "specifically prohibited"; [22] in other areas, however, Congress recognized that "so delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program," [23] and granted the Commission "discre-

[20] Securities and Exchange Commission, *Report on Proposals for Amendments of the Securities Act of 1933 and the Securities Exchange Act of 1934*, H.R. Comm. Print, 77th Cong., 1st Sess. 50 (1941).

[21] S. Rep. 792, 73d Cong., 2d Sess. 7 (1934).

[22] *Id.*

[23] *Id.*, at p. 5.

tionary and elastic" [24] powers to assure that those trading activities not improper in and of themselves, but carrying the potential for adverse manipulative consequences, would be employed under carefully circumscribed conditions subject to monitoring by the Commission.

One rule adopted by the Commission to fulfill this latter function was Securities Exchange Act Rule 10b-6. It governs and proscribes efforts by persons distributing securities to the public to bid in the open market for either the same securities, or other securities convertible into the securities being distributed. "The rationale [of the Rule] is that a potential purchaser of the securities being distributed should not be induced into buying them because of abnormal market pressures driving the price up through secret purchases by the issuer or [its] underwriters." [25]

Particularly in situations involving competing tender offers, anxious offerors, desirous of defeating their competitors, have an incentive to engage in transactions in violation of Rule 10b-6 in the hope of increasing the market price for the target company's securities to a price just below their own bid, but above the competing tender offer bid. Similarly, by publicly announcing the acquisition of shares so obtained, they hope to stampede undecided investors in a close contest into tendering shares hastily, in the

[24] *Id.*

[25] Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 666 (1973).

belief that the violator's tender offer is the one that will succeed, and the public will be denied an opportunity to participate unless they tender immediately. Either or both these consequences are undesirable, disrupt the orderliness of the securities markets, and are within the proscriptions of Rule 10b-6.

Once such violative conduct is demonstrated, any person actually injured by a violation of Rule 10b-6 should be accorded standing to pursue a private remedy. Such an action may be implied under generally accepted judicial decisions, but more properly should be recognized as one of several express remedies granted by Section 9(e) of the Securities Exchange Act, a section of the Act which embodies "an overall congressional intent to prevent 'manipulative and deceptive practices which fulfill no useful function' and * * * create[s] private actions for damages stemming from 'illicit practices,' where the defendant has not acted in good faith." *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. at 1386-1387.

DISCUSSION

I. IN ADOPTING THE WILLIAMS ACT IN 1968, CONGRESS INTENDED TO PROVIDE A COMPREHENSIVE SCHEME OF FEDERAL REGULATION FOR ALL TENDER OFFERS, AND TO CREATE FEDERAL RIGHTS FOR, AND OBLIGATIONS UPON, ALL PERSONS PARTICIPATING IN, OR DIRECTLY AFFECTED BY, CASH AND EXCHANGE TENDER OFFERS.

While this case may present an "epic battle" for this Court to resolve, it also presents the specific implementation of strategies, weapons and procedures

employed in tender offers generally ever since those seeking corporate control commenced utilizing modern tender offer techniques in 1920.[26] Those techniques, as well as those who employed them or were affected by them, were at the core of the Congressional realization in 1968, and again in 1970, that pervasive federal regulation of tender offers was a necessary component of the basic legislative enactments of the Congress in 1934, which were designed, among other things, to regulate and control "inequitable and unfair practices on [securities] exchanges and [the over-the-counter] markets * * *,"[27] and "to impose requirements necessary to make such regulation and control reasonably complete and effective * * *."[28] Accordingly, a recognition of the dynamics of the tender offer phenomenon, the motivations of the Congress in seeking to regulate it, and the results of that Congressional effort—the Williams Act—must precede any disposition of the issues raised by this case.

---

[26] Austin, *Tender Offers Revisted*, 8 Mergers & Acquisitions 16, 17 (Fall, 1973).

[27] Section 2 of the Securities Exchange Act, 15 U.S.C. 78b, 48 Stat. 818.

[28] *Id.*

Through "the general policy declarations of Congress in * * *" statutory provisions such as Section 2 of the Securities Exchange Act, "a veritable code of rules reveals itself * * * to follow in giving effect to the standards of * * *" the Act. *Cf., e.g., American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 105 (1946); *Yakus* v. *United States*, 321 U.S. 414, 419-427 (1944); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24-25 (1932); *Intermountain Rate Cases*, 234 U.S. 476 (1914).

A. The Dynamics of Tender Offers: The Contest For Control

1. *The emergence of the tender offer*

Prior to 1968, tender offers were unregulated. Although used as a device to obtain corporate control since 1920,[29] they were largely a foreign development.[30] American competition for corporate control had traditionally been waged through proxy contests, a form of corporate combat pervasively regulated by the federal gvernment since 1934.[31]

By 1968, however, former Commission Chairman Manual F. Cohen, in his preface to Aranow & Einhorn's classic treatise on proxy contests for corporate control, felt constrained to comment on an untoward and emerging trend in the takeover rage—a substantial equivalent to the familiar proxy fight[32]—of considerable concern and significance to the Commission, corporate managers, investors, securities market professionals and their advisors:

> "One of the most striking phenomena on the corporate scene in recent years has been the large

[29] Austin, *Tender Offers Revisited,* 8 Mergers & Acquisitions 16, 17 (Fall, 1973).

[30] See, *e.g.,* Aranow & Einhorn, *Proxy Contests for Corporate Control* 585-586 (2d ed., 1968).

[31] *Id.,* at xiii.

[32] See, *e.g.,* Fleischer & Mundheim, *Corporate Acquisition by Tender Offer,* 115 U. Pa. L. Rev. 317, 320-323 (1967); Hamilton, *Some Reflections on Cash Tender Offer Legislation,* 15 N.Y.L.F. 269, 293-301 (1969); Bromberg, *The Securities Law of Tender Offers,* 15 N.Y.L.F. 459, 471-472 (1969).

> number of mergers and other forms of acquisitions—particularly mergers and acquisitions involving companies in different fields. Informed observers have stated that they consider the merger proxy statements prepared under the Commission's Proxy Rules to be the most useful and informative documents available in evaluating today's "conglomerate" companies. But in the very recent past, the situation has been getting away from us. Statutory mergers and proxy contests, traditional means of acquiring control of a publicly held corporation, are being supplanted to an increasing degree by cash purchases either through tender offers or through private or open market purchases.[33]

"Tender offers," the process by which existing shareholders are solicited to tender their shares to the offering or bidding individual, group or corporation, have become an increasingly popular[34] and effective[35] method of obtaining control of publicly-

[33] Aranow & Einhorn, *Proxy Contests for Corporate Control,* xvii (2d ed., 1968).

[34] See Senate Committee on Banking, Housing and Urban Affairs, *Hearings on Corporate Takeovers,* 94th Cong., 2d Sess. 1 (1976). A more precise analysis of this development appears at pp. 25-26, of this brief. See also, Note, *Cash Tender Offers,* 83 Harv. L. Rev. 377 (1969); Note. *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934,* 86 Harv. L. Rev. 1250, 1253 (1973).

[35] See Note, *The Regulation of Corporate Tender Offers under Federal Securities Law: A New Challenge for Rule 10b-5,* 33 U. Chi. L. Rev. 359 (1966); Note, *The Williams Amendments: An Evaluation of the Early Returns,* 23 Vand. L. Rev. 700-704 (1970).

held "target" companies.[36]

The offer is normally extended for a limited and specified period of time, and the offeror's obligation actually to purchase or "take down" the securities "tendered" usually is contingent upon its ability to acquire all or a specified number of the target's securities within that time frame. The offer may be for cash, for an exchange of the offering company's securities, or a combination of both cash and securities.

The complexities involved in the practical application of tender offer principles are compounded by the fact that the ingenuity of those involved on both sides of a contested tender offer is boundless.[37] While tender offerors may, and often feel they must, proceed cunningly and aggressively in their efforts to secure control of "target" companies, they are frequently opposed with equal vigor by the existing managements of those "targets." Indeed, the ferocity of the resulting conflict is often such that it has been likened to nonviolent economic war.[38]

---

[36] Although tender offers do not automatically encompass attainment of control as their purpose, the offer is seldom content to be mere stockholders in the target company. Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 318 (1967).

[37] See, *e.g.*, House of Representatives Committee on Interstate and Foreign Commerce, *Hearings Before the Subcommittee on Commerce and Finance on H.R. 14475, S. 510*, 90th Cong., 2d Sess. 22 (1968) (hereinafter cited as "House Hearings").

[38] 116 *Cong. Rec.* 29252 (1970) (Remarks of Senator Williams); Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 Duke L.J. 231, 236 (1967); *Ruthlessness by the Rules*, 117 *Forbes* 24, 25 (Feb. 1, 1976); Blair & Co., *The Strategy of Tender Solicitation* (1967); Austin & Fishman, *Corporations in Conflict—The Tender Offer*, 119 (1970); Austin, *Tender Offer Statistics*, 10 Mergers & Acquisitions 9, 13 (Fall, 1975); Cary, *Corporations* 1633 (4th ed., 1969). Schmults & Kelley, *Cash Takeover Bids—Defensive Tactics*, 23 Bus. Law. 115 (1967).

In recent years, the use of the tender offer as a means of seeking control has increased:[39] for example, the number of tender offer notices and reports on solicitations and recommendations by persons other than the offeror filed with the Commission in fiscal year 1975, was treble the number of similar reports filed in fiscal 1971.[40] This virtual explosion in tender offers has dwarfed by comparison the number of proxy contests waged in the same time frame.[41] The

---

[39] See Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135 (Mar.-Apr., 1967), for "the only reasonably complete list of cash and stock tender offers made in the United States between January 1, 1956 and December 31, 1966." *Id.* at 148. Two similar studies of the growth of tender offers from 1956 to 1975 were later conducted by Dr. Donald V. Austin, Chairman of the Department of Finance, College of Business Administration of the University of Toledo. Austin, *Tender Offers Revisited*, 8 Mergers & Acquisitions 16, 17 (Fall, 1973); Austin, *Tender Offer Statistics*, 10 Mergers & Acquisitions 9 (Fall, 1975).

[40] Compare Securities and Exchange Commission, *37th Annual Report* 56 (1971), with Securities and Exchange Commission, *41st Annual Report* 51 (1975).

[41] The Commission's records disclose that proxy contests have not substantially varied in the last eight fiscal years, averaging approximately 24 per year. In approximately the same time span, the number of tender offers has increased significantly—three-fold, from 34 in fiscal year 1970 to 107 for fiscal year 1976.

ratio of tender offers to proxy contests increased during this time period from about 1.5:1 to almost 5:1, and the aggregate amount of cash or principal amount of securities offered in exchange for target securities plus brokerage commissions has increased almost nine times in the same period—from approximately $299 million in fiscal year 1971, to over $2.6 billion in fiscal year 1975.[42]

---

[42] These figures were compiled by the Commission's Office of Tender Offers, Acquisitions, and Small Issues.

Various factors appear to have contributed to the increased utilization of tender offers, rather than proxy contests, as a vehicle for gaining corporate control. The overall increase in the use of the tender offer has been attributed by some commentators to such factors as: increased corporate liquidity and readily available credit; comparatively depressed price/earnings ratios, book values, and cash or quick assets ratios, making acquisition via the tender offer more attractive; greater recognition, sophistication, and knowledge with respect to the takeover by tender offer; lack of extensive federal or state regulation of tender offers; quicker and more successful results when compared with a full-dress proxy contest; greater flexibility—the ability to hedge by reserving certain options against a final and irrevocable commitment; psychology—the appeal to shareholders in straight dollars and cents language, eliminating the need, as in a proxy contest, to convince the shareholder that the insurgent can do a more efficient job; and a new "respectability" for cash tender offers. Aranow & Einhorn, *Tender Offers for Corporate Control* 65-66 (1973). See also, Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 317-323 (1967); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 269-275 (1969). Cohen, *Tender Offers and Takeover Bids*, 23 Bus. Law. 611 (1968).

2. *The participants*

The offeror—and those in competition with it—the target company, incumbent management, market professionals, and the allies of each, all have vital economic interests in the outcome of the contest for corporate control. In this case, the role of three participants—the offeror, the target company, and the dealer-manager—are paramount, and the techniques they employ, as well as the techniques employed by the arbitrageurs who are critical to the success of tender offers, are discussed—although not condoned where violative of the federal securities laws—below.

a. *The offeror*

For a tender offeror, the stakes—majority control—are high: to the victor goes the spoils, including the right to hire and set salaries, to negotiate contracts and even to liquidate the corporation. And, while such powers, if abused, may subject insurgent management to a shareholder suit,[43] "judges are not business experts," [44] and the courts often give those in power a wide range of discretion.[45]

---

[43] See, *e.g.*, *Ross* v. *Bernard*, 396 U.S. 531 (1970).

[44] *Dodge* v. *Ford Motor Co.*, 204 Mich. 459, 465, 170 N.W. 668, 684 (1919).

[45] See, Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778 (1952) and Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 Duke L. J. 231, 242-243 (1967); Conard, *Corporations in Perspective* 199 (1976).

Professors Brudney and Chirelstein have noted that:

Once an offeror's initial analysis of a target company is concluded, a strike force is assembled to conduct the battle for control.[46] Since the incumbent management may employ "a variety of defensive measures that are successful in direct proportion to the speed of their execution," [47] secrecy is essential to assume the advantage of surprise and thereby to minimize the time available for incumbent management to prepare and execute its defense.[48] As one

---

"It is extremely difficult to prove that management's judgment has been tainted by self-interest, or that expectations of personal gain have led to price concessions at the stockholder's expense. Employment arrangements apparently entered into by parties dealing with each other at arm's length are hard to challenge on their own terms, especially when the parties are prepared to testify in support of the honest character of their undertakings."

Brudney, & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers,* 88 Harv. L. Rev. 297, 343 (1974).

[46] A small internal team of legal, accounting, public relations and executive officers with the capacity and authority to act quickly will direct the effort. Augmenting management's own resources will be a dealer-manager, soliciting agent, outside counsel, independent accountant, depository bank, forwarding agent and printer. 1 Flom, Lipton & Steinberger, *Takeovers and Takeouts—Tender Offers and Going Private* 10-11 (Law Jl. Pr., 1976). See also *Takeover Bids: Proceedings of Meeting Held in Lloyd's Writing Room, London on Tuesday, 20 July 1971,* 27 Bus. Law. 243, 259-263 (1971).

[47] Hayes & Taussig, *Tactics of Cash Takeover Bids,* 45 Harv. Bus. Rev. 135, 139 (1967).

[48] A tender offer is typically made for a value in excess of the market price; when the offer is disclosed, the market price invariably increases. Accordingly, secrecy about a possi-

commentator has noted, "The most important thing in this business is to keep your mouth shut. Acquisitions are made in dark rooms and strange places." [49]

An offeror will often need large sums to effect a successful takeover. To minimize the outlay of cash, some corporations offer to exchange their own shares,

---

ble takeover may also enable the offeror, through anonymous open market purchases, to acquire a number of shares at a lower price, resulting in substantial savings to the offeror which can later be employed to purchase additional shares. Pre-offer purchases, moreover, enable the offeror to get a feel for the market and the best tender price, as well as to develop a position in the target's securities that can be used to "soften management * * * and deter other bidders." 1 Flom, Lipton & Steinberger, *Takeovers and Takeouts—Tender Offers and Going Private* 10 (Law Jl. Pr., 1976). Since heavy buying on the market can drive up the market price of shares, however, "[k]nowing when to stop buying on the open market is (also) an important element in the bidder's strategy." Hayes & Taussig, *supra,* 45 Harv. Bus. Rev. at 139.

[49] *Financial Post,* January 10, 1970 at 10, Col. 2, also quoted in Anisman, *Takeover Bid Legislation in Canada,* (1974).

or warrants, for shares in the target company. The use of newly created warrants and notes—so-called "funny money"—to accomplish a takeover was prevalent in the late 1960's,[50] but has not kept pace in the 1970's with the explosion of tender offers generally. In other instances, corporations use cash from their own reserves or third party financing.[51]

Timing must be considered from two vantage points: first, the offeror must determine the length of time within which it wishes to extend its offer; and, second, the offeror must decide the date on which the offer will be made. A sufficient amount of time must be provided to allow shareholders to become acquainted with and accept the tender offer; but too much time will allow existing management the opportunity to muster its defenses successfully.[52] Mon-

[50] See Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 295 (1973); *Wall St. J.*, Feb. 26, 1969 at p. 3, Col. 2.

[51] While an offeror may borrow against its own existing assets, it is also possible to use the target company's assets effectively to refinance the takeover by collateralizing a loan to buy control with the target's securities previously purchased quietly in the open market. "Arranging this kind of loan is just like a corporation getting a line of credit, except that this loan cannot be drawn down unless the deal goes through." *The Takeover Titans*, 85 Finance 8, 12 (Aug. 1967). "[L]ike most lines of credit arrangements, the bank is usually promised the company's account when the new boys take over." *Ibid.*

[52] The exact time period of the intitial tender offer varies with the needs of the offeror. A recent survey of notable cash tender offers in 1975 and early 1976 has indicated that 10 to 14 days is the usual length of time between the announcement

day mornings are considered to be the ideal selection date, since five full trading days follow, without providing management any nontrading weekends in which to consolidate its defense.[53]

Once preparations are completed and the offer extended, the twin burdens of planning and defensive action shift to the target company's management and its allies. If there is a pre-arranged cooperative agreement with the offeror for some type of merger, very little activity on the part of the target's management is necessary. However, if management realizes that it will be displaced or the corporation is to be liquidated, a persistent struggle often ensues.

b. *The target*

A target may erect a number of obstacles to discourage a tender attack not yet made, but anticipated:

> "Only the limits of one's imagination restrict the host of measures possible. The corporate constitution may be fashioned to dilute the voting power of a successful takeover bidder or to make it impossible for the bidder to carry out the objective of the takeover. A freezing period on franchises, an increased special majority for

of the initial tender offer and its termination. Of course, the offeror always has the option of extending the time period as often as he wishes, "and offers are usually extended at least once." Troubh, *Purchased Affection: A Primer on Cash Tender Offers*, 54 Harv. Bus. Rev. 79, 80, 82-83 (Jul.-Aug., 1976).

[53] Austin & Fishman, *Corporations in Conflict: The Tender Offer* 119 (1970).

mergers into a takeover bidder, and classifying or staggering the board, if allowed in the jurisdiction, fall into this category. The incumbents may equip themselves with service contracts that would make their dismissal costly. Contracts with a wide variety of interests may also discourage takeovers by imposing burdens on the corporation in the event of a change of management. Labor contracts may provide for a wage increase, rent contracts may raise the rent or provide for renegotiation, and lending contracts may call for acceleration." [54]

Once the tender offer is made, however, existing management of the target usually communicates with the target's shareholders, initiating a public campaign to convince them that the offer is not in their best interests or those of the corporation.[55] Related

[54] Yoran, *Advanced Defensive Tactics Against Takeover Bids*, 21 Am. J. Comp. L. 531, 534 (1973).

[55] Fleischer & Mundheim, *supra*, 115 U. Pa. L. Rev. at 321. If management can effectively style the communication as being in the corporation's (as opposed to management's) best interest, the resources of the corporation may be used to finance the distribution of that information to its shareholders. *Id.* The communication may also appeal to stockholder loyalty to the company.

> "The problem with this type of defensive tactic is that most shareholders do not feel any special allegiance to the companies whose shares they own. This is perhaps even more so in the case of institutional shareholders where they are given a clear and relatively riskless opportunity to realize immediate profit."

5 Securities and Exchange Commission, *Report of the Institutional Investors Study*, H.R. Doc. No. 92-64, 92d Cong. 1st

corporate actions to keep existing shareholders in management's camp may also serve to chill the bidder's pursuit. Management, for example, may: raise dividends, which has the side effect of depleting corporate assets and making the corporation a less desirable target; effect a stock split, which may increase the value of each shareholder's portion of the target company,[56] while at the same time increasing brokerage expenses involved in acquiring the target securities; and refuse to disclose its stockholders list.[57]

Taking the offensive, the target may initiate litigation seeking a permanent or temporary injunction against the takeover. Such action, even if unsuccessful, will often serve to buy additional time for management to consolidate its counter-attack.[58] In an attempt to lessen the number of shares available on the market, the target may enter the market place

Sess. 2839 (1971). This is not to imply that shareholder loyalty can never be effective. See, *e.g.*, *The Takeover Titans*, 85 Finance 8, 13 (Aug., 1967).

[56] Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135, 143 (1967). But compare, Schmults & Kelley, *Cash Takeover Bids, Defense Tactics*, 23 Bus. Law. 115, 118 (1967).

[57] But see proposed Securities Exchange Act Rule 14e-1, Securities Act Release No. 5731 (Aug. 2, 1976).

[58] Lee, *Tender Offer Defense, How to Short Circuit the Corporate Raider*, 10 Mergers & Acquisitions 4, 5 (Fall, 1975). Some companies, in an effort to stop a takeover, will go to extremes to create a litigable issue. See, *e.g.*, *Ruthlessness by the Rules*, 117 Forbes 24, 26 (Feb. 1, 1976).

to purchase its own securities.[59] Such action can have "the double effect of driving the market price of the stock above the bid * * *," and thus defeating the offer[60] and may make the target liable for a violation of the federal securities laws. The target's management, often with the assistance of its investment banker, may also actively seek a merger with another corporation more to management's liking[61] —more of a lesser-of-the-evils approach than a solution.[62]

Innumerable other approaches are employed by management.[63] Regardless of the defense or defenses chosen, however, speed is essential. To be effective, the response must come within hours, not days.[64]

---

[59] Schmults & Kelley, *supra*, 23 Bus. Law. at 124.

[60] Hayes & Taussig, *supra*, 45 Harv. Bus. Rev. at 193.

[61] Austin & Fishman, *Corporations in Conflict: The Tender Offer* 135 (1970).

[62] See Aranow & Einhorn, *Tender Offers for Corporate Control* 256 (1973).

[63] See, *e.g.*, Taussig and Hayes, *Are Cash Take-Over Bids Unethical?* Financial Analysts J. 107 (Jan.-Feb. 1967); Bromberg, *Tender Offers: Safeguards and Restraints—An Interest Analysis*, 21 Case W. Res. L. Rev. 613 (1970); Brown, *Corporate Defenses to Takeover Bids*, 44 Tul. L. Rev. 517 (1970); Cary, *Corporate Devices Used to Insulate Management from Attack*, 25 Bus. Law. 339 (1970).

[64] Austin & Fishman, *Corporations in Conflict: The Tender Offer* 127 (1970).

c. *The arbitrageur*

Stimulated market activity inevitably follows the announcement of a tender offer, since the offer is typically made at a premium over market. Other purchasers, particularly the professional risk arbitrageur, then seek to join the offeror in purchasing the target's securities. Without these arbitrageurs, "there [would be] no tender offer as we know it today."[65] In fact, it has been estimated that arbitrageurs are responsible for over half of all shares ultimately tendered[66] and that they may be responsible for up to 90 percent of trading involved in an uncontested exchange offer.[67]

The arbitrageur functions as an intermediary between the offeror and the shareholder. By purchasing shares from the holder at a price between the current market value and the price of the tender offer, the arbitrageur assumes the risk that the tender offer will not be consummated, or that all the shares tendered will not be accepted, and, at the

---

[65] Senate Committee on Banking, Housing and Urban Affairs, *Hearings on Corporate Takeovers*, 94th Cong., 2d Sess. 60 (1976).

[66] O'Boyle, *Changing Tactics in Tender Offers*, 25 Bus. Law. 863, 866 (1970).

[67] *Huge Profits Out of Tiny Margins*, Bus. Week, May 28, 1966 at 116.

same time, seeks the reward of additional profits if the shares he holds are ultimately purchased.[68]

The role of the arbitrageur is an important one for the offeror. The arbitrageur's willingness to participate in the market is dependent upon his ability to turn over the securities he purchases quickly, to prevent being caught with an unwanted position for which he has paid a premium over market. By rapidly buying and simultaneously selling, the arbitrageur discourages shareholders from holding out for a higher price.[69] For the offeror, "every share tendered at a low price makes final acquistion that much cheaper." [70] Offerors have, therefore, been advised to encourage arbitrage by offering a good premium, limiting the conditions of the offer, offering a generous soliciting dealer's fee, and periodically checking the quantity of tenders received.[71] As one commentator expressed it:

> "We evolve the strategy to incur the total sympathy and cooperation and participation of two

[68] See generally, Aranow & Einhorn, *Tender Offers for Corporate Control* 173-191 (1973).

[69] The technique described above has a number of more sophisticated variations. See, *e.g.*, Evans, *Arbitrage in Domestic Securities in the United States* (1965); Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466 (1971); Baer & Sifka, *Does Arbitrage Create Institutional Opportunities?* 1 Institutional Investor 24 (Apr., 1967).

[70] *Ruthlessness by the Rules*, 117 Forbes 24, 25 (Feb. 1, 1976).

[71] Aranow & Einhorn, *Tender Offers for Corporate Control* 191 (1973).

> groups: our own private army of customers' men who we are going to bribe [by offering them a fee for every share of stock they induce investors to tender], and the arbitrageurs. We try to make as fail-safe a deal for them as we can so their risk is minimized, so they will be motivated to buy the stock, and by the time they get their hands on the stock they only have one goal in mind, to convert it back to cash." [72]

Since the arbitrageur's profit is largely dependent upon the success of the offer, as soon as it appears that a tender offer may fail, the arbitrageur will quickly liquidate his position. The arbitrageur's activity in simultaneously buying and selling the same security serves to reduce the price differential, and the arbitrageur's refusal to participate (or withdrawal) serves to maintain the discrepancy between the offered price and market price. A steady price movement and a gradual narrowing of the price spread, therefore, tends to indicate to sophisticated investors that arbitrageurs believe the tender offer will be successful. A stable or increased price differential, on the other hand, may indicate that the arbitrageur is skeptical about the ultimate success of the offer.[73]

[72] Senate Committee on Banking, Housing and Urban Affairs, *Hearings on Corporate Takeovers*, 94th Cong., 2d Sess. 60 (1976).

[73] Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466, 470 (1971).

d. *The dealer-manager*

The "dealer-manager," often referred to as the "investment banker" of the offeror or competing offeror,[74] functions as the chief assistant to the offeror in the planning and execution of the campaign. "His principal function is as an advisor to the issuer on policy and tactics, including disclosure questions, in planning the offer and in preparing the offering documents." [75] In the battle for control, he is the "acknowledged general" [76] who has the responsibility for pushing the project to completion:

> "[He] organizes, structures, evaluates, and coordinates the deal. Usually the most experienced person in the group, he is expected to prepare the agenda, check lists, time schedules, and similar guidelines as well as to recommend to the client the names of appropriate lawyers, depositary banks, soliciting agents, printers, and advertising agents. His stature must be such that it inspires confidence in the investment community (particularly in the arbitrageurs) that the tender offer will actually succeed." [77]

In addition to his obligation of soliciting and organizing other broker-dealers, he is expected to make recommendations as to the premium necessary for an effective tender offer, the contingencies of the offer

---

[74] See Troubh, *Purchased Affection: A Primer on Cash Tender Offers*, 54 Harv. Bus. Rev. 79, 87 (Jul.-Aug., 1976).

[75] Mundheim, et al., ed., *Sixth Annual Institute on Securities Regulation* 83 (P.L.I., 1975).

[76] Troubh, *supra*, 54 Harv. Bus. Rev. at 84.

[77] *Ibid.*

and the fees to be paid the solicting dealers.[78] Unlike underwriters of securities offerings, the dealer-manager's obligation does not encompass personal buying and selling; rather it relates primarily to structuring the deal, soliciting stockholders, and organizing other broker-dealers to solicit tenders.

Because the dealer-manager is part of the pretender offer planning process, he has access to privileged inside information and, therefore, may not participate in the market prior to the announcement.[79] After the announcement, he also acts as an agent for the offeror and must, therefore, limit his purchases to that contained in the tender offer.[80]

The dealer-manager's fee may be a flat sum or a "per-share" commission or a flat sum and an "override" fee on each share tendered. If the dealer-manager acts as a soliciting dealer,[81] he will be paid additionally for each share he personally solicits.[82]

---

[78] *Id.*, at 79-87.

[79] *Cf., Securities and Exchange Commission* v. *Healy*, 74 C-4305 (S.D. N.Y., 1974), SEC Litigation Rel. No. 6589 (Nov. 18, 1974; *Securities and Exchange Commission* v. *Sorg Printing Co.*, CCH Fed. Sec. L. Rep. ¶ 95,034 (S.D. N.Y., 1975).

[80] See 17 CFR 240.10b-13.

[81] The soliciting dealer is a broker-dealer who is paid a fee for each share of stock he induces investors to tender.

[82] "The fee to soliciting brokers generally approximates 2% of the purchase price of the tendered stock or 125% to 175% of a New York Stock Exchange commission on an equivalent Big Board Transaction." Troubh, *supra*, 54 Harv. Bus. Rev. at 86.

In addition to its fee, the typical agreement between the offeror and the dealer-manager contains a provision for reimbursement of the dealer-manager's expenses—including indemnification for any liability connected with the offer.[83] Unlike underwriters, whose fees are usually based on the number of securities to be issued and, in a firm commitment underwriting, purchased by him, a dealer-manager is often compensated quite handsomely even though he neither assures the success of the offer nor assumes the risks of a purchaser.[84]

The dealer-manager may, in the accomplishment of his goal, assume some of the characteristics of a mere underwriter, but those characteristics are only coincidental; his role, as general and tactician in an exchange tender offer, encompasses much more than the mere distribution of the offeror's shares and his total reimbursement usually reflects this difference.[85] Nor are these unimportant distinctions, particularly for the scope of the dealer-manager's ultimate liability for his actions. As one commentator recently noted:

> "The major difference between the underwriters' liability in a normal "firm" underwritten public offering and an exchange offer is that the dealer-

[83] Mundheim, et al., ed., *Sixth Annual Institute on Securities Regulation* 85 (P.L.I., 1975).

[84] "[F]ees of $500,000 to $1,000,000 are not unheard of in large tender-offers." Troubh, *supra*, 54 Harv. Bus. Rev. at 86.

[85] Troubh, *Purchased Affection: A Primer on Cash Tender Offers*, 54 Harv. Bus. Rev. 79, 84-89 (Jul.-Aug., 1976).

> manager in the exchange offer is potentially liable as sort of a 'super underwriter' for the entire package. In the typical Securities Act registration situation, the underwriting agreement is between the issuer and each of the underwriters severally, and the managing underwriter receives his management fee from the other participating underwriters. Therefore, within the statutory framework of Section 11 (e) of the Securities Act, the managing underwriter does not receive from the issuer any benefit that all other underwriters do not receive and he is not liable for more than the price at which he, the managing underwriter, sold his securities.
>
> "In the exchange offer, however, the dealer-manager receives a fee that the soliciting dealers do not receive, and, consequently, the benefits afforded by Section 11(e) would not be applicable and the dealer-manager would be liable for the full amount of the offering, subject to his right under Section 11(f) to receive contributions from other persons found liable under Section 11." [86]

[86] Mundheim, et al., ed. *Sixth Annual Institute on Securities Regulation* 88-89 (P.L.I., 1975).

B. Prior to the Adoption of the Williams Act, Tender Offers Were Virtually Unregulated, in Contrast to the Comprehensive Federal Regulation of Proxies and Proxy Contests.

Before the Williams Act,[87] few controls existed over tender offers. The states had not been governing tender offers,[88] and existing federal law had only peripheral application to them.[89] In those instances where the tender offer took the form of an exchange of shares—in essence, a sale of the offeror's stock—the transaction was subject to the disclosure requirements of the Securities Act of 1933.[90] However, that

[87] The Williams Act added new Sections 13(d), 13(e), 14(d)(e) and 14(f) to the Securities Exchange Act of 1934. Act of July 29, 1968, P.L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. 78m(d)-(e), 78n(d)-(f) (1970).

[88] Only one State, Virginia, had, by that time, even passed a statute regulating tender offers—that statute was enacted in March 1968, just four months prior to the Williams Act. Va. Code Ann. § 13.1-528, eff. Mar. 5, 1968 (3 CCH Blue Sky Law Rep. ¶ 49,228).

[89] See Fleischer & Mundheim, *Corporate Acquisition By Tender Offer*, 115 U. Pa. L. Rev. 317, 328-349 (1967); Note, *The Regulation of Corporate Tender Offers Under Federal Securities Laws: A New Challenge For Rule 10b-5*, 33 U. Chi. L. Rev. 359, 373-376 (1966); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 572-610 (1973).

[90] See S. Rep. No. 550, 90th Cong., 1st Sess. 2-3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968). See also Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462 (1969); Hamilton, *Some Relections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 273-274 (1969); Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 379 (1969); Note, *The Developing Meaning of "Tender Offer" Under the Securities*

Act was not applicable when only cash, rather than an exchange of securities was involved.[91] Nor was it clear that a tender offeror was an "insider" for the purpose of imposing disclosure obligations under Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder with respect to its future plans for the target company or material information concerning the issuer's affairs prior to its becoming a controlling shareholder.[92] And the disclosure requirements were felt by some not to apply to the activities of persons who opposed tender offers.[93]

Act of 1934, 86 Harv. L. Rev. 1250, 1254 (1973); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700, 702 (1970).

[91] See Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135, 137 (Mar.-Apr., 1967); Bromberg, *supra*, 15 N.Y.L.F. at 462-463; Hamilton, *supra*, 15 N.Y.L.F. 273-275; Note, *supra*, 86 Harv. L. Rev. at 1253-1254; Note, *supra*, 83 Harv. L. Rev. at 377-381; Note, *supra*, 23 Vand. L. Rev. at 700-704; Binder, *supra*, 18 N.Y.L.F. at 610.

[92] See, *e.g.*, *Mills* v. *Sarjem Corp.*, 133 F. Supp. 753 (D. N.J., 1955); Senate Hearings, pp. 143, 183; House Hearings, p. 59. For a discussion of the role of Section 10(b) and Rule 10b-5 in the setting of tender offers prior to adoption of the Williams Act, see Binder, *supra*, 18 N.Y.L.F. at 572-599; Note, *Current Problems Under the Securities Acts—The Expanding Use of Rule 10b-5*, 10 B.C. Ind. & Com'l. Rev. 313, 328-334 (1969). Loss, *The Role of Rule 10b-5 in Tender Offers*, Securities Regulation and Transfer Report (Special Report, Jan., 1969).

[93] Senate Hearings, p. 28; House Hearings, pp. 18, 59.

At common law, a person selling a controlling interest in a corporation, in certain instances, might be liable under the so-called corporate asset theory [94] and, if he delivered immediate control, had to be reasonably sure that the buyer was not intent upon looting the corporate treasury; [95] but that was the extent of common law restrictions on persons cooperating with tender offerors.[96]

There were few, if any, effective controls on the conduct of persons opposing tender offers, as well. As the court below surmised (A. 30), the common law recognized the tortious nature of a deliberate, unreasonable, interference in an economic relationship or prospective advantage, and thus imposed liability for such deliberate actions as the circulation of a malicious misstatement involving some disparagement of a plaintiff's property, business or person.[97] Conceivably, incumbent management might be liable at common law for circulating a false statement about an offeror in an effort to overcome a takeover bid, but only if it could be shown that management had acted intentionally and maliciously, had deliberately lied, and had intended to cause the specific injury actually suffered.[98] And, even then, the cause of action was so limited that it presented no viable remedy even for deliberate conduct in the tender offer context.[99] Thus, prior state law regulated

[94] See, *e.g.*, *Perlman* v. *Feldman*, 219 F.2d 713 (C.A. 2), *certiorari denied*, 349 U.S. 952 (1955). See also, Jennings, *Trading in Corporate Control*, 44 Cal. L. Rev. 1 (1956); Leech, *Transactions in Corporate Control*, 104 U. Pa. L. Rev. 725 (1956); Hill, *The Sale of Controlling Shares*, 70 Harv. L. Rev. 986 (1957).

[95] See, *e.g.*, *Insuranceshares Corp.* v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (E.D. Pa., 1940) and the discussions thereof appearing in Notes, 19 Chi. Kent L. Rev. 193 (1941); 26 Cornell L. Q. 325 (1941); 54 Harv. L. Rev. 648 (1941); 25 Minn. L. Rev. 335 (1941); 27 Va. L. Rev. 546 (1941). See also, *Gerdes* v. *Reynolds*, 28 N.Y.S. 2d 622 (Sup. Ct., 1941); *Swinney* v. *Keebler Co.*, 329 F. Supp. 216 (S.D. Cal., 1971), *reversed* 480 F.2d 573 (C.A. 4, 1973); *Levy* v. *Fernberg*, 29 N.Y.S. 2d 550 (Sup. Ct., 1941); *Dale* v. *Temple Co.*, 186 Tenn. 69, 208 S.W. 2d 344 (1948).

[96] Austin & Fishman, *Corporations in Conflict* 25-34 (1970); Kennedy, *Tender Moment*, 23 Bus. Law. 1091, 1094 (1968).

[97] See Prosser, *The Law of Torts*, 919-969 (4th ed., 1971); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 321 (1967); Halpern, *Intentional Torts and the Restatement*, 7 Buff. L. Rev. 7 (1952).

[98] Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 321 (1967). And see, *Peffer* v. *Bennett*, 523 F. 2d 1323, 1325 (C.A. 10, 1975); *Susskind* v. *IPCO Hospital Supply Corp.*, 373 N.Y.S. 2d 627, 629 (App. Div., 1975); *Wegman* v. *Dairylea Corp., Inc.*, 376 N.Y.S. 2d 728, 735 (App. Div., 1975); *Leonard Duckworth, Inc.* v. *Michael L. Field & Co.*, 516 F. 2d 952, 957 (C.A. 5, 1975); *Glenn* v. *Point Park College*, 272 A. 2d 895, 899 (Pa., 1971); *Philips Chemical Co.* v. *Hulbert*, 301 F. 2d 747, 750 (C.A. 5, 1962); *DeSantis* v. *City of Troy*, 371 N.Y.S. 2d 310, 315 (Sup. Ct., Rens. Cty, 1975); *Hiers* v. *Cohen*, 329 A. 2d 609, 612 (Conn., 1973); *Martin* v. *Philips Petroleum Co.*, 445 S.W. 2d 429, 435 (Ct. of Civ. App. of Tex., 1970).

[99] See American Law Institute, *Restatement of Torts 2d*, Sec. 768 (Tent. Draft No. 14, 1969); 1 Harper & James, *The Law of Torts* 474-481 (1950); Prosser, *The Law of Torts* 955 (4th ed., 1971); *Middlesex Concrete, etc.* v. *Carteret Indus. Ass'n.*, 181 A.2d 774, 781 (N.J., 1962).

the takeover process only indirectly, with virtually no restrictions on the takeover bid itself.[100] For example, management, in opposing a tender offer with corporate funds or purchasing shares of the corporation to thwart the offeror, merely had to be careful not to give the appearance of acting in its own self-interest; but, self-interest is difficult to prove, and therefore such activities by management were generally upheld.[101]

In short, in the absence of an occasional temporary restraining order for a violation of state libel and

---

[100] State law provided some safeguards for the improper use of corporate assets to defeat the takeover bid, see, *e.g.*, *Condec Corp.* v. *Lunkenheimer Corp.*, 43 Del. Ch. 353, 220 A. 2d 769 (1967), but none to the use of corporate assets in making a takeover bid. Such use could always be justified on the basis of the business judgment rule. See *Casey* v. *Woodruff*, 49 N.Y.S. 2d 625, 642 (Spec. Terms, N.Y. Co. 1944), cited with approval in *Otis & Co.* v. *Pennsylvania R. Co.*, 61 F. Supp. 905 (E.D. Pa., 1945), *affirmed*, 155 F. 2d 522 (C.A. 3, 1946).

[101] See *Cheff* v. *Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (1964); *Kors* v. *Carey*, 39 Del. Ch. 47, 158 A.2d 136 (1960); *Martin* v. *American Potash Chem. Corp.*, 33 Del. Ch. 234, 92 A.2d 295 (1952). See also, Senate Hearings, p. 121. Israels, *Corporate Purchases of Its Own Shares—Are There New Overtones*, 50 Cornell L. Q. 620 (1965).

federal fraud laws—to the extent applicable[102]—tender offer campaigns could be waged fast and furiously, without regulation or control, and without regard to the fairness, honesty and orderliness of the securities markets.

This absence of regulation of tender offers was in sharp contrast to the comprehensive federal regulation of the more traditional means of capturing control of corporations—the proxy contest. In 1934, Congress, in Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a), had granted the Commission sweeping authority to adopt rules to regulate and control proxy solicitations. Indeed, the wide scope of the Commission's authority under Section 14(a) is reflected in the statutory standard that the Commission's rules be "necessary or appropriate *in the public interest* or for the protection of investors" (emphasis added)[103]—a standard which contemplates the protection not only of investors but also of others involved in, or affected by the contest.[104] As the Senate Report on Stock Exchange Practices noted:

> "It is contemplated that the rules and regulations promulgated by the Commission will protect investors from promiscuous solicitation of their proxies, on the one hand, by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious cor-

---

[102] House Hearings, pp. 18, 59; Senate Hearings, p. 210.

[103] See Senate Hearings, p. 191.

[104] See pp. 69-74, *infra*.

poration officials; and, on the other hand, by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting facts." [105]

The Commission, without attempting to affect control or interfere in the strategy of participants in a proxy contest,[106] evolved pervasive rules which reflect one of "the major accomplishments flowing from the 1934 Act for the benefit of the investing public and the market place generally." [107] As one commentator has stated: "The proxy rules are very likely the most effective disclosure device in the SEC scheme of things." [108]

C. Regulation of Tender offers was Needed Because Significant Abuses Had Developed.

As a result of the regulatory vacuum existing prior to the Williams Act with respect to tender offers, a number of abuses had developed—abuses which were harmful to *all* the various participants in a tender offer contest.

---

[105] S. Rep. No. 1455, 73d Cong., 2d Sess. 77 (1934).

[106] Senate Committee on Banking and Currency, *Hearings Before a Subcommittee on S. 876,* 84th Cong., 1st Sess. 1695, 1696 (1956) (Remarks of former Commission Chairman Armstrong).

[107] House Committee on Interstate and Foreign Commerce, *Hearings on H.R. 6789, H.R. 6793, S. 1642,* 88th Cong., 1st & 2d Sess. 165 (1964).

[108] 2 Loss, *Securities Regulation* 1027 (2d ed., 1961).

A major abuse—found to threaten public confidence in securities as a medium of investment [109] and the integrity of the marketplace itself [110]—was the secrecy with which the process was enshrouded. Senator Kuchel, a co-sponsor of the Williams Act, lamented the futile position of both management and shareholders, uninformed and caught within the "tragedy" of the "rape" of the target by corporate raiders acting under a "cloak of secrecy".[111] The problem was compounded by the combatants' dissemination of "a rash of charges and counter charges" [112] —neither clearly subject to existing disclosure requirements nor susceptible to control under existing antifraud provisions [113]—variously characterized dur-

---

[109] S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967), ("Senate Report"), H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968) ("House Report").

[110] Speech by Chairman Cohen before the Association of the Bar of the City of New York, April 14, 1967, reprinted at Senate Hearings, p. 203. Citing the "drastic effects" of secret takeover bids on the price of the target's securities, it was noted in the Senate record:

> "In these circumstances trading is characterized by rumor, by speculation and by fear, characteristics which are hardly conducive to public confidence in the securities markets."

See also, Senate Hearings, pp. 2, 42-43, 48, 49, 52.

[111] Senate Hearings, p. 43.

[112] Senate Hearings, pp. 19, 35.

[113] *Id.*

ing the Senate Hearings as containing "inaccurate," [114] "overly enthusiastic promising statements," [115] and as having "quite a bit of puff in them." [116]

Referring specifically to abuses by management in opposing a tender offer, then Commission Chairman Cohen emphasized:

> "If management does oppose the offer, the present lack of regulation leaves it with powerful weapons, which it may wield with impunity, provided its activities fall short of fraud.[117] Management tactics may include making all sorts of predictions and extravagant claims * * *" [118]

Another abuse involved the "undue pressure on shareholders to act hastily and to accept the offer, before *management or any other group* has an opportunity to present opposing arguments or competing offers." [119] The Congress was told that offers,

---

[114] Senate Hearings, p. 31. Section 14(e) was conceived by its drafters as preventing "inaccurate or incomplete" presentations. See 112 Cong. Rec. 19003 (1966) and discussion, *infra*, pp. 64-69.

[115] Senate Hearings, p. 125.

[116] Senate Hearings, p. 159.

[117] Moreover, Chairman Cohen also cautioned the Congress:

> "A majority of the district courts which have considered the question have concluded that the antifraud provisions of the Securities Exchange Act do not apply because the misleading announcement was not issued 'in connection with' trading in securities by the corporation."

House Hearings, p. 59.

[118] Senate Hearings, p. 196. See also, Senate Hearings, pp. 19, 31, 35, 38, 178; House Hearings, pp. 13, 18.

[119] Senate Hearings, pp. 21, 35 (emphasis supplied).

made at a premium over market, were announced under conditions creating the impression that a "hasty deposit" was required to participate in a transaction structured on a "first-come, first-served basis." [120] Those who succumbed were predictably deprived of taking advantage of "later and better offers, either from the same or a different source." [121] And, Congress was cautioned that insurgents were not the sole offenders—there existed a similar need to stem the pressure exerted by "management or others in opposition to a tender offer" through legislation "which would make it more difficult to frighten shareholders into refusing a tender offer on the basis of unsubstantiated or irrelevant arguments." [122]

Finally, tender offerors, target managements and their allies were found to have engaged in manipulative conduct as an integral part of their offensive and defensive strategies. The activities of desperate target managements, funded by corporate treasuries, and assisted by "friendly" [123] "outsiders who went into the market and purchased shares with the implicit purpose of driving up the price of the shares and therefore making the tender offer bid look un-

---

[120] Senate Hearings, p. 17. See also, House Hearings, p. 16.

[121] Senate Hearings, p. 17.

[122] Speech by Chairman Cohen before Association of the Bar of the City of New York, April 14, 1967, reprinted at Senate Hearings, pp. 202, 204-205.

[123] Senate Hearings, p. 60.

attractive to investors," [124] were of particular concern:

> "Management * * * may go into the market using corporate funds to buy stock for the purpose of frustrating the tender offer, either by reducing the supply available for tender, or by pushing up the price, or both." [125]

And, to further complicate matters and confuse the marketplace, while target managements and their allies were "arranging bids or purchases to raise the market so as to defeat the tender offer," tender offerors were "arranging offers or sales * * * in order to make the tender offer attractive." [126]

D. In Passing the Williams Act, Congress Intended to Fill the Regulatory Gap by Enacting a Comprehensive Scheme of Regulation Comparable to That Which Governed Proxy Contests.

In seeking to remedy the abuses in the tender offer area, Congress was acutely aware of the obvious parallel between tender offers and proxy contests [127] and that many of the same practical problems of providing shareholders with a balanced presentation existed: [128]

---

[124] Senate Hearings, p. 62. See also, Senate Hearings, p. 236.

[125] Senate Hearings, p. 196. See also, Senate Hearings, pp. 3, 27.

[126] Senate Hearings, p. 131 (as to target managements and tender offerors); *id.*, at pp. 60, 62, 236 (as to "allies").

[127] Senate Hearings, p. 206.

[128] *Id.* See also, Senate Hearings, pp. 180-181.

> "[A]cquisitions of blocks of voting securities are typically alternatives to proxy solicitations, as methods of capturing or preserving control. In either case there is involved a form of industrial warfare in which the stakes are high, and two or more groups are attempting to manipulate the public security holder to their own advantage." [129]

Congress recognized that the protections ultimately afforded by the Williams Act were patterned on the existing proxy regulation provisions of the federal securities laws [130] and designed to permit the Commission to exercise the same sort of control over the process.[131] Broad rulemaking authority was granted to the Commission to make effective the statutory scheme and, in the cases of contested or competing tender offers, to prevent "high pressure appeals and procedures possible when no restraints, other than the anti-fraud provisions of the securities laws, relate to those activities." [132]

In short, as Chairman Cohen explained, the Williams Act would "fill a gap, a rather large gap in the securities statutes": [133]

> "The procedures provided by the bill in the case of contested tender offers are analogous to those

---

[129] Senate Hearings, pp. 16, 33; House Hearings, p. 11.

[130] 113 Cong. Rec. 24664 (1967).

[131] Senate Hearings, p. 206.

[132] Senate Hearings, p. 20.

[133] Senate Hearings, pp. 20-21.

now followed when contending factions solicit proxies under the Commission's proxy rules."

Congressional recognition of the similarity of approach between enforcement of the Williams Act and enforcement of the proxy regulations—particularly with respect to implied private rights of action—was reflected in the references to this Court's landmark decision in *J. I. Case Co.* v. *Borak, supra*, upholding implied private rights of action for damages under the proxy rules. Professor Carlos Israels, a prominent commentator on the securities laws, in discussing the enforcement of the bill's provisions and giving an example of a situation in which a private action would lie, stated:

> "Presumably we may assume that the Commission will be able to enforce the provisions of this Bill * * * and of its rules thereunder by proceedings for injunction in the Federal courts; and that under J. I. Case Co. v. Borak, 377 U.S. 426 (1964) a private litigant could seek similar relief before or after the significant fact such as the acceptance of his tender of securities." [134]

E. The Williams Act Provides a Pervasive Scheme of Federal Regulation of Tender Offers.

The Williams Act, as finally adopted, embodies the Congressional response to a significant area of previously unregulated securities activity affecting the

[134] Senate Hearings, p. 67. See also, Senate Hearings, p. 140.

control of publicly-held corporations. Its provisions reflect the results of Congress's attempts to resolve the market problems attributable to tender offers and the tactics used in opposing them, as described above, and to establish standards of normative conduct for all participants in, or persons affected by, tender offers, without tipping the scales in favor either of incumbent management and its allies, or in favor of insurgent groups seeking to persuade existing shareholders and the marketplace that a change in control of the target of the takeover bid, and, perhaps, a change in its management, would be desirable.

The legislation, as originally introduced in 1965, had the somewhat limited objective of protecting target corporations and their shareholders from the activities of "corporate raiders".[135] Subsequently, the bill was dramatically revised, and, as finally enacted, it was intended to provide comprehensive and even-handed protection to all participants in the tender offer process.

Senator Williams' original tender offer legislative proposal was S. 2731, introduced by him in October, 1965. Although in introducing that bill he expressed broad concern about "orderly and honest markets," [136] his main emphasis was upon imposing new obligations and duties upon persons making tender offers:

[135] 111 Cong. Rec. 28258, 28259 (1965).

[136] 111 Cong. Rec. 28258 (1965); see also, Senate Hearings, p. 132.

> "In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves * * *.
>
> "The ultimate responsibility for preventing this kind of industrial sabotage lies with the management and the shareholders of the corporation that is so threatened. But the leniency of our laws places management and shareholders at a distinct disadvantage in coming to grips with the enemy." [137]

The provisions of S. 2731 were viewed as working "to the disadvantage of any corporate takeover specialists who could not stand the full glare of a public spotlight." [138] S. 2731 would have attacked takeover problems from the bill's limited perspective in essentially three ways. To protect the target company, it would have (1) amended the reporting of insider transaction provisions of Section 16 of the Securities Exchange Act; [139] and (2) imposed advance disclosure and filing requirements on persons making cash tender offers and certain other acquisitions of securi-

[137] 111 Cong. Rec. 28257-28259 (1965).

[138] 111 Cong. Rec. 28258 (1965).

[139] The amendment to Section 16 would have had the effect of subjecting tender offerors and persons associated with them to the reporting and short-swing profit liability provisions in certain situations for the first time; the beneficiary of the expanded short-swing liability would have been the target corporation.

ties.[140] A third feature of the bill—the grant of rule-making authority to the Commission to impose requirements with respect to purchases by corporations of their own securities [141]—would have assisted tender offerors.

Subsequent to the introduction of S. 2731, the Commission submitted extensive comments on that bill to Senator Williams, together with a proposed revision of the bill embodying the changes which the Commission suggested.[142] This led to the introduction by Senator Williams in 1967 of S. 510, which was essentially the Commission's proposed revision.[143]

The Commission's suggested changes, together with additional changes added during the hearings on the bill, expanded the scope of the protections which the legislation afforded, the range of persons benefiting from the legislation's protections and those subject to

[140] The advance disclosure and filing provisions would have prevented persons from making cash tender offers or certain other acquisitions of securities until 20 days after filing information with the Commission and furnishing the information to the target company.

[141] This provision was limited to situations in which the target corporation's defensive tactics involved such repurchases.

[142] 112 Cong. Rec. 19003-19007 (1966).

[143] 113 Cong. Rec. 854-857 (1967). See also, Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 381 at n. 28 (1969); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 610-611 (1973); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 275-276 (1969); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700 (1970).

duties and obligations under the legislation by adding restrictions on the conduct of persons opposing tender offers. In particular, they greatly expanded the protections afforded to tender offerors against defensive tactics of their opponents. Further, in an effort to avoid the imposition of greater obligations on proponents than on opponents of tender offers, it cut back on some of the restrictions applicable to tender offerors.

First, S. 510, as the Commission recommended, deleted the original proposed amendments to the reporting and short-swing liability provisions of Section 16 of the Securities Exchange Act, thus relieving tender offerors of a considerable burden which the original proposal, S. 2731, would have imposed. S. 510 further changed the focus of the original bill, by transferring the provisions governing securities acquisitions, as distinguished from tender offers, from Section 10 to Section 13 of the Securities Exchange Act—a reporting section [144]—and by transferring those provisions dealing with tender offers to Section 14 of the Act, in accordance with the Commission's suggestion that "it would be appropriate to place these matters in Section 14 of the Securities Exchange Act of 1934, the proxy section, and incorporate in the

[144] With respect to acquisitions, S. 510 also changed the 20-day advance filing requirement to a requirement that the filing be made within 7 days after the acquisition (a 10-day interval was ultimately permitted). The Commission had suggested that a requirement for subsequent, rather than advance, filing "would be less burdensome. * * *" 112 Cong. Rec. 19004 (1966).

proposed statute administrative machinery to handle tender offers similar to the Commission's proxy rules." [145]

S. 510 also abandoned any provision for advance filing, removing a requirement which could have delayed and otherwise burdened tender offers.[146] And, in accordance with the Commission's suggestion, a provision was added to S. 510 permitting a tendering shareholder to withdraw his securities at any time during the first 7 days of the tender offer and at any time after 60 days from the commencement of the tender offer. As its history makes clear, this 7-day provision was intended not only to give shareholders who tender their shares immediately "a short period within which to reconsider," [147] but also to promote competing tender offers at higher prices by enabling the shareholder to withdraw his shares and accept a higher bid.[148]

[145] 112 Cong. Rec. 19005 (1966).

[146] Senate Report p. 4. See also, Senate Hearings, at pp. 74-75, 88-89, 98, 108, 111, 151, 163; House Hearings, at pp. 45, 52-53.

[147] Senate Report, p. 10; House Report, p. 10.

[148] In this regard, in response to questioning from Congressman Stuckey about whether competitive bidding was something "we ought to get away from," Mr. West of the New York Stock Exchange replied: "We think competition is the life of trade, and if they want to increase * * * [the bid], let them do it. It is a healthy thing." House Hearings, p. 47. Chairman Cohen promptly agreed, stating: "We think that competition is the life of trade, too." *Id.*

A pro-rata acceptance provision (ultimately Section 14(d)(6)) also was added by S. 510, in accordance with the Commission's suggestion,[149] to provide fairness for shareholders and to promote competition by facilitating competing tender offers. This was accomplished by precluding the tender offeror from using a "first-come, first-served" basis in accepting tendered shares, removing the pressures on shareholders to make hasty, ill-considered decisions and, to some extent, encouraging shareholders to wait for a better offer. The Senate Committee modified the pro-rata acceptance requirement, which, as introduced, would have applied throughout the life of the tender offer, by limiting the requirement to those shares which are tendered during the first 10 days of a tender offer or during the first 10 days after any increase in the tender offer—a provision opposed by the Commission as overly protective of tender offerors at the expense of the shareholders.[150] Con-

[149] As recommended by the Commission and introduced by Senator Williams, this provision would have required that, where a greater number of securities is deposited during the tender offer than the offer calls for, the securities shall be taken up pro rata according to the number deposited by each shareholder. 112 Cong. Rec. 19005 (1966); 113 Cong. Rec. 856 (1967).

[150] House Hearings, p. 42. Milton Cohen, writing in April 1968, after passage of the Senate version but before passage of the House version, confirmed the view that the changes made as a result of the presentation by the commentators at the hearings "avoid undue impediments to tender offers * * *." Cohen, *Tender Offers and Takeover Bids*, 23 Bus. Law. 611, 619 (1968). However, he warned: "I think that the proof will

gress disagreed and acted to assure equality of treatment to the "competing interests":

> "[Disadvantages to the original] approach * * * are that stockholders are encouraged to sit on the fence until the last moment and it tips the scales further in favor of management by affording it the life of the tender offer to marshall its considerable resources. A rule along the lines of the New York Stock Exchange policy should satisfactorily resolve the competing interests." [151]

Unlike S. 2731, which provided little protection against unfair activity by management or others in opposition to a tender offer, S. 510, in accordance with the Commission's suggestions, contained detailed provisions designed to provide broad protection not only against the improper conduct of tender offerors but also against that of persons opposing tender offers. For example, Section 14(d)(4),[152] added by S. 510, was proposed by the Commission to enhance its rulemaking authority to place the opposing parties

come in the actual administration of the law by the SEC, and it is here that vigilance will be required on the part of those concerned with the protection of offerees as well as those concerned with fostering freedom of enterprise." *Id.*

[151] Senate Hearings, p. 131 (footnotes omitted).

[152] "Any solicitation or recommendation to the holders of * * * a security to *accept or reject* a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors" (emphasis supplied).

"on a more nearly equal footing." [153] The broad scope of this rulemaking authority and the wide range of persons whose conduct would be subject to regulation thereunder were recognized in the Senate and House Reports, which stated:

> "Under this provision the Securities and Exchange Commission could specify the information to be included in any recommendation *by management or others in favor of or in opposition to a tender offer* and could regulate the solicitation of investors *by brokers and dealers* who are often compensated for shares tendered as a result of their activities. It would also enable the Securities and Exchange Commission to regulate the activities of *persons who make competing tender offers or seek to influence the investor's decision on a tender offer.*" [154]

And, in accordance with the Commission's suggestion, S. 510 added a self-operative provision—ultimately enacted as Section 14(e)—which, like Section 14(d)(4), expanded the legislation's protections against the conduct of persons who oppose tender offers.[155] In recommending this provision, the Com-

[153] 112 Cong. Rec. 19005 (1966).

[154] Senate Report, p. 9; House Report, p. 10 (emphasis supplied).

[155] Section 14(e), as enacted in 1968, provided:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders *in opposition to or in favor of* any such offer, request, or invitation.

15 U.S.C. 78n(e) (1968) (emphasis supplied).

See also Mundheim, *Tender Offers*, 2 Rev. of Securities Regulation 953, 956 (1969); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 626-627 (1973); Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 459, 470-474 (1969); Hamilton, *Some Reflections on Cash Tender Offers*, 83 Harv. L. Rev. 377, 382 (1969); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1259-1260 (1973).

mission recognized that its function under it, as its function under Section 14(d)(4), was to furnish broad protection against the conduct of persons both opposing and favoring a tender offer.[156] The Commission stated:

> "The Commission believes that a provision such as this presents an additional protection, beyond the rule-making power suggested in other parts of the bill, against possible dissemination of inaccurate or incomplete information or fraudulent acts or practices by persons who make or invite tender offers and affords a more practical means of preventing inaccurate or incomplete presentations or fraudulent acts or practices by persons opposing or favoring such tender offers than would be provided by additional rulemaking

[156] As originally proposed, this provision would have been part of Section 2 of S. 510, and therefore would not have reached solicitations in opposition to *exchange* offers, which had been exempted from Section 14(d). However, the provision became applicable to all tender offers when it was placed in a separate subparagraph of Section 14—Section 14(e).

> power with respect to acts and practices of such persons or to materials emanating from them in their efforts to get existing shareholders to accept or not to accept tender offers." [157]

Congress borrowed heavily from existing antifraud and misleading statement provisions in the federal securities laws, and the rules adopted under them by the Commission, in enacting Section 14(e), to assure the success of its attempts to require the fullest possible disclosure by tender offerors and those opposing them, as well as to assure the success of its attempts to proscribe conduct which might unfairly influence the outcome—one way or the other—of cash or exchange tender offers for corporate control.[158]

Unlike the other provisions of the Williams Act, however, Section 14(e), "in the tradition of the general fraud provisions of the [Securities Act of] 1933

---

[157] 112 Cong. Rec. 19005 (1966). The Commission went on to explain that a provision like Section 14(e) would provide "a more practical means" of protection than additional rule-making authority, stating:

> "This would appear to be especially true in view of the shortness of time for * * * persons [opposing or favoring tender offers] to act after the tender offer is made and the fact that possible grounds for opposing or favoring varying types of tender offers are so wide and unpredictable in scope as to make it a difficult area to deal with on a rule-making basis." *Id.*

[158] 6 Loss, *Securities Regulation*, 3660-3661 (Supp., 1969); Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462, 468, 470-474 (1969); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 289-293 (1969); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 610-611, 626-641 (1973).

and [the Securities Exchange Act of] 1934 * * *, applies to all securities without regard to registration." [159] But, in adapting the Commission's broad proxy and antifraud rules to tender offer contests, Congress did not simply proscribe only "fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer" or "any solicitation in opposition to or in favor of any such offer * * *," as it had done in other provisions of the federal securities laws. Rather, as the Commission had done in adopting Securities Exchange Act Rule 14a-9, for proxy materials, Congress also intended to, and did, reach and prevent any misleading, inaccurate, inadequate or overly optimistic statements used by any of

---

[159] Section 14(e) is broad and sweeping in its proscriptions. It governs conduct by any person involving either misleading statements or omissions of material facts, similar to the proscriptions contained in

> —Section 17(a) of the Securities Act (prohibiting fraud in the offer or sale of securities);
>
> —Section 10(b) of the Securities Exchange Act, and the Commission's Rule 10b-5 adopted under the latter section (barring fraudulent, deceptive or manipulative conduct in connection with the purchase or sale of any security);
>
> —Security Exchange Act Rule 14a-9, (proscribing misleading statements in proxy soliciting materials); and
>
> —Section 15(c)(1) of the Securities Exchange Act and Rules 15c-1 and 15c-2 under the latter section (governing the conduct of brokers and dealers in securities).

The borrowing from these sections and rules was not inadvertent. See, *e.g.*, Senate Hearings, p. 140 (testimony of Professor Painter).

the participants in the tender offer process—whether deliberately or inadvertently made.[160]

Section 14(e) also reflects the widespread recognition, as demonstrated by the allegations and findings of the Court below in this case (A. 7-A 18), that the success of a tender offer, management's opposition to a tender offer, or the outcome of a competing bidder's offer, often depend on manipulative activities in the marketplace to affect the market price of the target company's securities.[161] Accordingly, Section 14(e)

---

[160] See, *e.g.*, Senate Hearings, p. 178 (testimony of then Chairman Cohen):

> "[T]he management may wish to put out literature opposing the bid. That literature may not be subject to easy establishment as being outright fraudulent, but it may be inadequate. It may omit material information."

See also, *id.*, p. 196 (testimony of Chairman Cohen) ("If management does oppose the offer, the present lack of regulation leaves it with powerful weapons, which it may wield with impunity, provided its activities fall short of fraud"); *id.*, p. 31 (testimony of Chairman Cohen) (analogizing the bill to the proxy rules and emphasizing the need for a prefiling provision to avoid inadvertent or advertent misleading statements); House Hearings, p. 17 (to the same effect); Senate Hearings, p. 159 (testimony of Donald Regan); *id.*, p. 99 (testimony of Ralph Saul ("the accuracy of the information [disseminated] is assured by the sanctions of [the substantially identical predecessor of Section 14(e)] of the bill * * *")); *id.*, p. 125 (testimony of Professor Mundheim).

[161] See, *e.g.*, 113 Cong. Rec. 855 (1967) (Remarks of Senator Williams); Senate Hearings, p. 3 (Remarks of Senator Williams); *id.*, p. 60 (testimony of Professor Hayes) ("we fully concur with the intent of the bill to eliminate the manipulation of the stock prices during the period that a tender offer is outstanding"). And see *id.*, p. 131 (testimony of Arthur Fleischer, Jr.).

bars any person from engaging in manipulative acts or practices generally, and, as amended in 1970, it also authorizes the Commission to define, and to adopt additional regulations to "prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative."

Nor did Congress intend its general proscription against manipulative conduct in connection with tender offers to suffice. Recognizing that management, either directly or through its allies, had often engaged in repurchasing its own securities—deliberately or unintentionally—affecting the market price of its securities, and, concommitantly (or consequentially), deflating the attractiveness of an unfriendly tender offer, Section 13(e) of the Act was adopted to govern such repurchases and strip them of their intended or unintended manipulative effects.[162] It ac-

---

[162] See, *e.g.*, 113 Cong. Rec. 856 (1967) (Remarks of Senator Williams):

> "Such stock purchase programs, however, may involve substantial amounts of securities and can have a substantial effect on the market price. There have been disturbing instances, where, it has been suggested, that such programs may have been utilized as a device to manipulate the market to serve the purpose of the corporation or of those who control it. *Even where no manipulative purpose exists, market impact can be substantial and, particularly where the corporations' incursions into the market occur sporadically, unnecessary and undesirable price fluctuations can result*" (emphasis supplied).

[Footnote continued on page 69]

complishes this task by making it unlawful for an issuer to purchase any of its own equity securities in contravention of Commission rules adopted to define and "to prescribe means reasonably designed to prevent" any "fraudulent, deceptive or manipulative" practices.[163]

[162] [Continued]

See also, Senate Hearings, p. 3 (remarks of Senator Williams); *id.*, pp. 27, 37 (testimony of Chairman Cohen).

The concern over manipulative purchases of the target corporation's stock extended to situations in which management had "no improper motive" (*id.*, p. 27) as well as to "purchases by a parent or subsidiary of the issuer, or anyone else in a control relationship with the issuer * * *" (*id.*, p. 28). And to "friends" of management, see *id.*, pp. 60, 62 (testimony of Professor Hayes).

[163] Commission rules under Section 13(e) may also require the issuer to furnish whatever information the Commission deems necessary or material with respect to such matters as the reasons for purchases; the source of the funds to be used; the number of shares to be purchased; the price; and the method of purchase.

F. Congress Recognized that the Williams Act Should Protect All Persons Interested in, or Affected by, Tender Offers.

The legislative history of the Williams Act is, as petitioners assert, replete with statements about the need to protect the shareholders of the target corporation.[164] But, the legislative history, as well as the specific language of the Williams Act, also demonstrates that Congress was well aware that "shareholders alone are not the only persons concerned" [165] and that there was a need to protect, and it intended to protect, a much broader range of interests and persons.

Detriment to the marketplace generally was forcefully before the Congress, and it sought to avoid that evil. Since "the confusion that develops [where there are competing offers at different prices] can have a very serious adverse affect on the public confidence in the integrity and openness of the securities markets," [166] Congress was concerned with the need to protect, and to place on an equal footing, all participants in the marketplace, including the businessmen who make tender offers, current stockholders and potential investors.[167]

Congress wanted to assure all participants not only that all material information would be available, but

[164] See, *e.g.*, Senate Hearings, pp. 2, 15, 16, 42, 43, 107.

[165] Senate Hearings, p. 178.

[166] Senate Hearings, p. 18.

[167] Senate Hearings, pp. 70-71; see also, 113 Cong. Rec. 854-855 (1967).

also that they would be participating in a fair contest in which all such information would also be available to the persons with whom they deal. As Senator Williams emphasized at the opening of the Senate hearings on S. 510.

> "It is our Nation's legitimate businessmen as well as the more than 20 million American shareholders who have the most to gain from this legislation. This bill will put all on an equal footing with respect to the availability of significant facts about a tender offer or a corporate stock purchase program. *All will be able to deal in the securities markets knowing that all of the pertinent facts are available. This is the premise under which our securities markets are supposed to work.*" [168]

Among the nonshareholder participants expressly recognized by Congress as needing protection were the target corporation and its management.[169] Senator Williams stressed that the Senate Committee had taken "extreme care" [170] to protect the legitimate interests of the corporation and its management.[171]

---

[168] Senate Hearings, p. 3 (emphasis added). See also 113 Cong. Rec. 856 (1967). The foregoing concern for equality among participants has particular relevance to the provision involved in this case—Section 14(e)—which is expressly directed both to persons opposing and to those favoring a tender offer.

[169] 113 Cong. Rec. 854-855 (1967).

[170] Senate Report, pp. 3-4.

[171] 113 Cong. Rec. 854-855 (1967). See also, Senate Hearings, pp. 43, 46.

Similar protections were intended for the tender offeror. As noted, Congress expressed its interest in assuring the fairness of the competition for corporate control by providing equal rights and treatment in a tender offer contest so that "the forces in contention can have full play." [172] And the Congress emphasized that it had also taken "extreme care" to provide an equal opportunity to both the insurgents and the entrenched, "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." [173] Providing that equality of opportunity was critical, Congress was told, because the "scales [were] pretty unbalanced * * * and unbalanced in the favor of management," [174] management, which one commentator observed, had "less and less responsibility and accountability to shareholders." [175]

Thus, the tender offer was seen as an alternative device to permit shifts in corporate control [176] from managements that had become smug and complacent in office.[177] Critics of early versions of the bill [178]

---

[172] House Hearings, pp. 47-48; see also, House Report, p. 4; 113 Cong. Rec. 854 (1967); Senate Hearings, pp. 25, 204-205; *Fairer Deal for All In Takeovers Is The Aim*, The Times (of London), Sept. 6, 1967.

[173] Senate Report, p. 3.

[174] Senate Hearings, p. 117.

[175] Senate Hearings, p. 120; Senate Hearings, pp. 133-134.

[176] Senate Hearings, pp. 115-116.

[177] Senate Hearings, pp. 133-134.

[178] Professors Kaplan, Mundheim and Painter were the primary critics of the bill.

argued that it would discourage and impede tender offers, which served salutary purposes. Indeed, in their view, tender offers presented the only realistic opportunity to oust inefficient management.[179] Those entrenched were seen to be virtually unassailable through their control of the proxy machinery, and the challenging proxy solicitor was required to make a very costly investment without much chance of winning the fight.[180] The problem was compounded by the observable inertia of stockholders [181] and the fact that management had the use of corporate funds to purchase the securities of a disagreeing shareholder "to protect corporate policy" [182] and had "strong allies—banks with which the corporation keeps its deposits, insurance companies with which it places business, suppliers and customers." [183]

The results were predictable: proxy contests had become less effective [184] and management had been successful in over two-thirds of the tender offers at-

---

[179] Senate Hearings, p. 116.

[180] Senate Hearings, pp. 116; 120, 121; 133-134.

[181] Senate Hearings, p. 121, citing *Kors* v. *Carey*, 39 Del. Ch. 47, 158 A. 2d 136 (1960) and *Cheff* v. *Mathes*, 41 Del. Ch. 494, 199 A. 2d 548 (1964).

[182] Senate Hearings, p. 121.

[183] Senate Hearings, pp. 137-138.

[184] Senate Hearings, p. 120.

tempted prior to 1966.[185] The commentators criticized S. 510 as tipping the scales even further in favor of management.[186]

As a result, Congress amended the draft bill to make it less burdensome to tender offerors—it eliminated any advance filing requirement for tender offers and it limited an offeror's obligation, in cases where more shares are tendered than requested, to accept shares tendered on a pro-rata basis to those shares tendered within the first ten days. Significantly, both of these changes were strongly opposed by the Commission, which believed that, in these areas, the interests of shareholders outweighed the interests of tender offerors.[187] Notwithstanding this objection, Congress made both changes, specifically indicating its desire to protect the tender offeror's "opportunity to fairly present [its] case." [188] In this regard, the Congress took some comfort from the Commission's concession that, if the bill did not adequately protect

---

[185] Senate Hearings, p. 117.

[186] Senate Hearings, p. 127.

[187] Senate Hearings, p. 31; House Hearings, pp. 17-18, 42, 50, 53.

[188] Senate Report, p. 3; House Report, p. 4. During the House Hearings, for example, Chairman Cohen had noted "that in trying to take care of the company or the offeror we have to remember that the exercise here is to protect the investor. * * * the person to which this whole game is directed." But Congressman Stuckey disagreed: "I also think we have an obligation to the corporations of the United States." Chairman Cohen quickly concurred: "I could not agree with that more." House Hearings, p. 52.

the interests of tender offerors, particularly against management opposition to takeover efforts, the criticism of the bill—that it inadequately concerned itself with the interests of offerors—"would have considerable merit." [189] As S. 510 finally was enacted, Congress perceived that it had fulfilled the need for comprehensive legislation "substantially" to reduce "the ability of incumbent management to frustrate an attractive and desirable tender offer" [190]—even if the legislation would, as Chairman Cohen indicated, also "serve to help the takeover bidder." [191]

II. CONSISTENT WITH ITS PRIOR TEACHINGS, SOUND POLICY, AND UNDERLYING CONGRESSIONAL INTENT, THIS COURT SHOULD AFFIRM THAT A PRIVATE RIGHT OF ACTION MAY BE IMPLIED UNDER SECTION 14(e) OF THE SECURITIES EXCHANGE ACT ON BEHALF OF A COMPETING TENDER OFFEROR AGAINST THOSE WHOSE MISLEADING STATEMENTS HAVE INJURED IT.

As the foregoing discussion demonstrates, the Williams Act legislation adopted by the Congress in 1968, and strengthened by the amendments to it in 1970, creates the same "pervasive legislative scheme governing the relationship between * * *" the broad range of persons interested in, and interests affected

---

[189] Senate Hearings, pp. 183, 184.

[190] Senate Hearings, pp. 184, 196.

[191] Senate Hearings, p. 178.

by, tender offers as this Court repeatedly has found to exist in the area of proxy regulation, *Cort* v. *Ash*, 422 U.S. 66, 82 (1975); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). And, as "[i]n *Borak*, the statute involved [here is] * * * clearly an intrusion of federal law into the internal affairs of corporations * * *" and the affairs of those seeking to engage in contests for corporate control. *Cort* v. *Ash*, *supra*, 422 U.S. at 85.

In adopting the Securities Exchange Act of 1934, Congress was acutely aware of the need for private civil enforcement of violations of the Act.[192] It recognized that the duties it had created in turn created rights in favor of persons injured by a breach of those duties, and that simple justice required recognition of the right of those so injured to be made whole for any wrongs they might suffer.[193] More importantly, Congress also was aware that, without private enforcement of the federal securities laws,

---

[192] Congress provided express civil remedies in Sections 11, 12, and 15 of the Securities Act of 1933, 15 U.S.C. 77k, 77e, and 77o, and in Sections 9, 16, 18, and 20 of the Securities and Exchange Act of 1934, 15 U.S.C. 78i, 78p, 78r, and 78t. The legislative histories of the two Acts reveal the Congressional awareness of the need for private civil enforcement. See, *e.g.*, S. Rep. No. 47, 73d Cong., 1st Sess. 6 (1933); H.R. Rep. No. 85, 73d Cong., 1st Sess. 9-10 (1933); H.R. Rep. No. 152, 73d Cong., 1st Sess. 26-27 (1933); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 36-37 (1934).

[193] See, *e.g.*, Sections 11, 12, and 15 of the Securities Act, and Sections 9, 18, 20, and 28(a) of the Securities Exchange Act; H.R. Rep. No. 1383, 73d Cong., 2d Sess. 36-38 (1934).

many violations of those laws likely would go undetected or unreported, and the legislative enactment would want for proper enforcement—a result inconsistent with Congress's express intention to make its scheme of regulation and control "reasonably complete and effective." [194]

In this case, one of the contestants in a contest for corporate control—entitled, by law, to fair competition in that contest—is seeking to enforce that duty and obligation, imposed by Section 14(e) of the Securities Exchange Act, against a rival contestant, the management of the target company and the allies of both. Aside from the notions of simple justice it serves to satisfy, the maintenance of such an action makes viable Congress's legislative enactment. In words applicable to the instant case, Thomas G. Corcoran, a spokesman for the principal drafters of the Securities Exchange Act,[195] explained why express civil liabilities had been included in the Act, and summed up the appropriateness and necessity of private actions in this context:

> "The principle of civil liability for the damage * * * is moreover not only a matter of justice to the person injured but is also the surest way of guaranteeing that there will be some compliance with the section. In other words, *there is no policeman so effective as the one whose*

[194] 15 U.S.C. 78b.

[195] See *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375, 1385 (1976).

> *pocketbook is affected by the degree to which he enforces the law.*" [196]

In full recognition of the remedial scope and breadth of the federal securities laws generally,[197] and the Securities Exchange Act specifically,[198] this Court's decisions have found that the need, justification and authority for implied remedies under the Securities Exchange Act is "clear".[199]

The clarity with which this Court discerned the appropriateness of such implied private remedies stems, in part, from the Act itself, since Section 27 of the Securities Exchange Act "*specifically* grants the appropriate District Courts jurisdiction over 'all suits in equity and actions at law to enforce *any* liability or duty created' under the Act." *J. I. Case Co.* v. *Borak, supra*, 377 U.S. at 430-431 (emphasis supplied); *accord, Securities Investor Protection Corporation* v. *Barbour*, 421 U.S. 412, 424 (1975); *Cort*

[196] Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.), pt. 15, National Securities Exchange Act of 1934*, 73d Cong., 1st Sess. 6518 (1934) (emphasis supplied).

[197] *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1972); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

[198] *Ibid.*

[199] *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 430 (1964); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 424 (1975).

v. *Ash*, *supra*, 422 U.S. at 79 n. 11. It also stems from the two-century old teachings of English jurisprudence that,

> "in every case, where a Statute enacts or prohibits a Thing for the Benefit of a Person, he shall have a Remedy upon the same Statute for the Thing enacted for his Advantage or for the Recompence of a Wrong done to him contrary to said law." [200]

And this jurisprudential wisdom was accepted by this Court in *Marbury* v. *Madison*, 1 Cranch 137, 163, 5 U.S. 87, 102-103 (1803), where Chief Justice Marshall stated: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

[200] 1 Comyn's Digest 248 (1762).

This doctrine was applied by Lord Campbell in *Couch* v. *Steel*, 3 E. & B. 402, 411, 118 Eng. Reprint 1193, 1196 (Q.B. 1854). Despite criticism leveled at the decision's specific application of the principle cited in the text above (see, Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317, 320 (1914)), the concept has been widely accepted in this country (see, *e.g.*, American Law Institute, *Restatement of Torts 2d* Sec. 286 (1965)), and apparently is the basis of some of this Court's prior decisions. See, *e.g.*, *Marbury* v. *Madison*, 1 Cranch 137, 5 U.S. 87 (1803); *Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967) (citing the *Restatement of Torts 2d* § 286); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1972); *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 730; *cf.*, *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49 (1975); see also, *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

Indeed, even in cases unlike the present one [201] where a "clear" [202] provision of the relevant statute does not "specifically" [203] grant jurisdiction to private parties to enforce the Act's liabilities and obligations, this Court has acknowledged the propriety of the federal courts implying a private right of action if there exists "a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard, * * *" [204] or "standards of conduct that a private action could help to enforce * * *," [205] or "harm * * * of the type the statute was intended to forestall * * *." [206] Not one, but all three, of these factors exist here, as we have seen. As this Court has held in similar circumstances,

> "Congress has legislated and made its purpose clear; it has provided enough federal law in [the section under review] from which appropriate remedies may be fashioned even though they

[201] See, *e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 420-421 (1975); *Cort* v. *Ash*, 422 U.S. 66, 79-80 (1975).

[202] *Cort* v. *Ash*, *supra*, 422 U.S. at 79 n. 11.

[203] *Id.*, 422 U.S. at 82.

[204] *Cort* v. *Ash*, *supra*, 422 U.S. at 82.

[205] *Securities Investor Protection Corp.* v. *Barbour*, *supra*, 421 U.S. at 424.

[206] *Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967).

> rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great designs of this legislation."

United States v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960); *Wyandotte Co.* v. *United States*, 389 U.S. 191, 203 (1967).

But, as in *Borak*, "[t]he petitioners [here] make no concessions * * *." [207] They emphasize that Congress made no specific reference to a private right of action in Section 14(e) of the Act, at the same time ignoring Section 27 of the Act; that the right should not extend to suits by defeated tender offerors; and, as was unsuccessfully urged in *Borak*, that, even if a private right of action exists, it "should be limited to prospective relief only." [208] Accordingly, and although the question has been resolved time and again contrary to the posture they urge before this Court, the petitioners seek to present to the Court, once again, the argument "whether a private remedy is implicit in * * *" [209] the Securities Exchange Act —in this case, for tender offerors claiming injury as a result of petitioners' violations of law.

Even assuming that such an issue were a novel one, this Court recently has specified four factors it deems "relevant" in "determining whether a private remedy is implicit in a statute not expressly providing one * * *": [210]

---

[207] *J.I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 431.

[208] *Id.*

[209] *Cort* v. *Ash*, *supra*, 422 U.S. at 78.

[210] *Id.* (citations omitted, emphasis in original).

> —"First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' * * * that is, does the statute create a federal right in favor of the plaintiff?";
>
> —"Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?";
>
> —"Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?";
>
> —"And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

A reading of *Cort*, *supra*, 422 U.S. at 78-85, makes clear that the private remedy so clearly and properly implied in *Borak* also would have met each of these four standards. Given the explicit Congressional intent to create an identical regulatory structure for tender offers as exists for proxies,[211] it is not surprising that application in this case of the four factors specified above compels the conclusion that it is also appropriate to accord standing to tender offerors to sue for injuries they have sustained as a result of violations of the Williams Act.[212]

---

[211] See discussion at pp. 42-48, 52-54, *supra*.

[212] Note Section 1412(b) of the American Law Institute's proposed *Federal Securities Code*, which expressly provides that a "person who has made or proposes to make a tender request" has a cause of action against a defendant that has

A. Tender Offerors Are Within the Especial Class for Whose Benefit the Williams Act Was Enacted.

This Court has concluded that a plaintiff is "one of the class for whose especial benefit the statute was enacted," [213] and thus "inferred a federal private cause of action not expressly provided, * * *" [214] where there "generally" is either (1) a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," [215] or (2) "a clearly articulated federal right in the plaintiff." [216] A tender offer seeking to enforce a violation arising under Section 14(e) of the Williams Act meets both alternatives of this *Cort* formulation.

---

violated any of the various provisions specified therein dealing with tender offers. That provision further authorizes the court to award, among other forms of relief, "damages against the violator for any loss caused by his violation."

[213] *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916).

[214] *Cort* v. *Ash*, *supra*, 422 U.S. at 82, citing *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

[215] *Cort* v. *Ash*, *supra*, 422 U S. at 82.

[216] *Id.*, citing *J. I. Case Co.* v. *Borak*, *supra*.

1. The Williams Act Is a Pervasive Legislative Scheme Governing the Relationship Between a Tender Offeror and the Other Participants in a Contest for Control, Including the Target, a Competing Tender Offeror and Their Allies.

Although the Securities Act and Securities Exchange Act were viewed by the Congress that adopted them as vesting broad federal "jurisdiction over the source of and traffic in securities," [217] those acts were not sufficient to deal with tender offer abuses. As we have seen, prior to the Williams Act few controls existed over tender offers; existing federal law had but peripheral application,[218] common law restrictions were inapplicable or ineffective and state regulation either was nonexistent or not directed to the specific evils inherent in contested campaigns for corporate control.[219]

The Williams Act added Sections 13(d), 13(e), 14(d) and 14(e) to the Securities Exchange Act to provide sweeping protections for shareholders and contestants in a takeover battle—including tender offerors. Particularly with respect to Section 14(e) of the Act, drafted as a far-reaching, self-implementing supplement to the rulemaking powers granted to the Commission in the other parts of the Act, protections were provided against:

> "* * * dissemination of inaccurate *or* incomplete information *or* fraudulent acts *or* practices by

---

[217] S. Rep. No. 1455, 73d Cong., 2d Sess. 393 (1934).

[218] See discussion at pp. 42-48, 52-54, *supra*.

[219] *Id.*

> persons who make or invite tender offers *and* [to] affor[d] a more practical means of preventing inaccurate *or* incomplete presentations *or* fraudulent acts *or* practices by persons opposing or favoring such tender offers." [220]

And, the breadth of Section 14(e) reflects Congress's desire that the new protections of the Act be interpreted "not technically and restrictively but flexibly to effectuate its remedial purposes," as this Court had interpreted pre-existing statutory provisions.[221]

As the legislative history of the Williams Act shows, acquisitions of "blocks of voting securities are typically alternatives to proxy solicitations as methods of capturing or preserving control".[222] The Act was "patterned after the present law and regulation which govern proxy contests",[223] where "an elaborate scheme of proxy regulation had been developed,"[224] and was designed "to provide the same kind of disclosure requirements" which exists for proxies.[225] In-

---

[220] 112 Cong. Rec. 19005 (1966) (emphasis supplied).

[221] *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1972); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

[222] Senate Hearings, pp. 16, 33.

[223] 113 Cong. Rec. 24665 (1967) (Remarks of Senator Williams).

[224] House Hearings, p. 21.

[225] 113 Cong. Rec. 24665 (1967) (Remarks of Senator Williams).

deed, since the pervasive scheme of proxy regulation had been variously termed as one of the "major accomplishments" of the Securities Exchange Act,[226] and "very likely the most effective disclosure device in the SEC scheme of things," [227] Congress sought to curb analogous abuses in connection with tender offers by employing similar means.[228] "The Williams Act is clearly related to the proxy provisions and should be construed to operate in harmony with them;" [229] a "rational consistency" must be maintained between the two provisions,[230] since they are "close companions" in a single, unified statutory scheme.[231]

In this context, therefore, both the proxy and tender offer regulations were designed to insure that, where there are competing interests, shareholders are provided with a balanced presentation of opposing arguments [232] and the opponents have an equal opportunity to compete for the control of the corporation:[233] the

---

[226] 2 Loss, *Securities Regulation*, 1027 (2d ed., 1961).

[227] 113 Cong. Rec. 24664 (1967); see also 113 Cong. Rec. 9340 (1967) and text and notes, *supra*, pp. 47-48.

[228] See *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 423 (C.A. 1, 1973).

[229] *Bath Indus. Inc.* v. *Blot*, 427 F.2d 97, 100 (C.A. 7, 1970).

[230] *Id.*, 427 F.2d at 110.

[231] *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719 (C.A. 2, 1971).

[232] See Senate Hearings, p. 206.

[233] *Id.* The Commission has recently published, and now has under consideration, proposals to amend its tender offer rules pursuant to Section 14(e). Securities Act Rel. No. 5731 (Aug. 2, 1976). If adopted, the Commission's proposals would, among

pervasiveness of the two regulatory schemes is parallel and co-extensive.[234]

2. *The Williams Act Creates an Articulated Federal Right in Favor of Each of the Participants in the Contest for Control, Including Tender Offerors.*

While Senator Williams' original legislative proposal isolated target management as the "especial class" to be protected from the predatory activities of "corporate raiders," [235] the bill finally enacted sought to avoid tipping the balance in favor of either contestant and to assure that tender offerors would have a fair competitive environment in which to bid for control.[236] As this Court recently confirmed:

> "The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen

---

other things, require target companies to furnish offerors their most recent shareholder lists "in order to provide the bidder with an opportunity to directly communicate with security holders equal to that of the subject company."

[234] The pervasiveness of the regulatory pattern over tender offers and its parallel to the regulation of proxy solicitations are further underscored by the Commission's recent proposals to amend its tender offer rules. These relate to disclosure, dissemination of materials and the fairness of the contest. See Securities Act Rel. No. 5731 (Aug. 2, 1976).

[235] See discussion at pp. 54-58, *supra*.

[236] See discussion at pp. 69-74, *supra*.

> commented upon the 'extreme care' which was taken 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.' " [237]

The scales that had been unbalanced in favor of management were righted as the legislation progressed through the Congress: tender offerors were relieved from the attempt to impose the considerable burdens of Section 16 of the Securities Exchange Act contained in Senator Williams's original bill; prefiling provisions that would have delayed tender offers were abandoned, and withdrawal provisions which benefited shareholders as much as competing tender offerors were added; *pro rata* provisions were included—even over the objection of the Commission that they were overly protective of offerors at the expense of shareholder-offerees; and, broad rulemaking authority was provided for the Commission to place insurgents and entrenched management on a more equal footing.[238] Most significantly, the Commission recommended, and the Congress adopted, Section 14(e) as a self-operative provision of the Act which, far from arrogating special status to targets or even shareholders, furnished protections to each participant and neutralized some of the powerful weapons that might otherwise be available to the management of the target.

---

[237] *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 58-59 (1975).

[238] See discussion at pp. 54-69, *supra*.

The legislative history of the Act evidences an intent to establish federal rights for tender offerors. References in the legislative record for a need to provide a viable alternative to proxy contests as a means of effecting shifts in corporate control,[239] and reducing the ability of incumbent management to frustrate desirable tenders[240]—even if that would "serve to help the takeover bidder"[241]—cannot be viewed otherwise. Nor can the specific references in favor of tender offerors in such provisions as Sections 14(d)(4) and 14(e) of the Act—establishing requirements of fairness and honesty to be obeyed by persons *opposing* tender offerors—be read as anything other than evidencing a Congressional intent to protect offerors as well as shareholders.

Finally, such indications also are apparent from judicial determinations under the proxy regulation provisions as well as the Williams Act, that tender offerors have an articulated federal right under Section 14(e).[242] Indeed, although the plaintiff in *Borak* was a shareholder suing individually and derivatively, this Court recognized that "[t]he purpose of Section 14(a) is to prevent management *or others* from obtaining authorization for corporate action by

---

[239] See, *e.g.*, S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess., 4 (1968); Senate Hearings, pp. 115-116.

[240] See discussion, *supra*, at pp. 44-47, 61-68, 69-74.

[241] Senate Hearings, p. 178.

[242] See discussion at pp. 109-123, *infra*.

means of deceptive or inadequate disclosure in proxy solicitation." *J. I. Case Co.* v. *Borak, supra*, 377 U.S. at 431 (emphasis supplied). *Accord, Union Pacific Railroad Company* v. *Chicago and North Western Railway Company*, 226 F. Supp. 400, 406 (N.D. Ill., 1964), where the court had no difficulty in finding that a proxy contestant had "a genuine interest" in assuring that its efforts would not be thwarted by the "prohibited conduct" of a rival contestant.[243]

In the same vein, the court in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F. 2d 787 (C.A. 2, 1969), commented that, had the Williams Act been in effect at the time of the conduct there complained of by the plaintiff tender offeror, "Section 14(e) * * * should [have] serve[d] to resolve any doubts about standing in the tender offer cases. * * *" *Id.*, at 798-799. *Accord, Sargent* v. *Genesco*, 492 F.2d 750 (C.A. 5, 1974) ("the right to bring suit has not been limited to tendering offerees but has been extended to numerous other parties who claimed to be victims of 14(e) violations"); *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421 (C.A. 1, 1973) (recognizing the standing of an offeror to maintain an action against a target).

The specific legislative provisions of the Williams Act, the legislative record of the Congress and judicial determinations reviewing them all demonstrate that a federal right in tender offerors to enforce the provisions of the Williams Act was articulated by the Congress.

---

[243] See discussion at pp. 69-74, *supra*, and 109-111, *infra*.

B. Congress Was Aware of the Importance of Private Remedies for Participants in Tender Offers in Enacting the Williams Act.

As this Court has noted, "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such [a] cause of action would be controlling." *Cort* v. *Ash*, 422 U.S. at 78 (emphasis in original). Here, there is, of course, no legislative history that can be cited as evidencing "an explicit purpose to *deny*" a cause of action to participants in tender offers, and, indeed, there is ample evidence that Congress was aware of the need for such private remedies.

This Court's concern with the absence of an "explicit purpose to *deny* [a private] cause of action" was preceded by almost 30 years in the first case implying a private remedy under the federal securities laws, the "seminal" [244] case of *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa., 1946):

> "Of course, the legislature may withhold from parties injured the right to recover damages arising by reason of violation of a statute *but the right is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly.* The defendants argue that such intention can be deduced from the fact

[244] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

that three other sections of the statute (Sections 9, 16 and 18) each declaring certain types of conduct illegal, all expressly provide for a civil action by a person injured and for incidents and limitations of it, whereas Sec. 10 does not. The argument is not without force. Were the whole question one of statutory interpretation it might be convincing, but the question is only partly such. *It is whether an intention can be implied to deny a remedy and to wipe out a liability which normally, by virtue of basic principles of tort law accompanies the doing of the prohibited act.* Where, as here, the whole statute discloses a broad purpose to regulate securities transactions of all kinds and, as a part of such regulation, the specific section in question provides for the elimination of all manipulative or deceptive methods in such transactions, the construction contended for by the defendants may not be adopted. In other words, in view of the general purpose of the Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies." [245]

Far from expressing a clear and plain intention to withhold private remedies under the Williams Act, Congress chose to enact the broad and inclusive proscriptions of Section 14(e), fully aware of the pre-

[245] See also, *Cort* v. *Ash*, *supra*, 422 U.S. at 79, 80, 82-83 n. 14; *cf. National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-461 (1974); *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 471-472, 477 & n. 18 (1959); *Wyandotte Co.* v. *United States*, 389 U.S. 191, 199-200 (1967).

dictable consequences that had attached to similar legislative enactments—enforcement would be effected by both the Commission *and* private litigants.

Professor Carlos Israels specifically brought *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. 426, and its implications for private actions under the proposed bill, to the attention of the Congress when he testified that, presumably, "under *J. I. Case Co.* v. *Borak*," a "private litigant could seek . . . relief" under the Williams Act.[246] Much in the same vein, Professor William Painter advised the legislators that language, similar to that of Section 14(e), was "being judicially construed to allow not only injunctive relief by the Commission and criminal penalties for willful violations but also private remedies to injured investors * * *."[247] Chairman Cohen expressly referred to the fact that litigation between private parties engaged in a tender offer battle was a common occurrence,[248] and alerted the Congress to the fact that the buyer-seller limitation attributed to Rule 10b-5[249] made such litigation ineffective[250]—a problem Congress expressly remedied by its more liberal standing

[246] Senate Hearings, p. 67 (citation omitted).

[247] Senate Hearings, p. 140.

[248] House Hearings, p. 19; *cf.*, House Hearings, pp. 22-30, 59; Senate Hearings, p. 143.

[249] *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (C.A. 2, 1952), *certiorari denied*, 343 U.S. 956 (1952); adopted by this Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

[250] House Hearings, p. 59.

requirements in Section 14(e).[251] These references were consistent with the views of other commentators who, contemporaneously with Congress's consideration of the Williams Act, published their conclusions that the Williams Act, if passed, would establish private rights of action.[252]

Moreover, the Congress explicitly acted to improve existing controls over inaccurate or misleading disclosures after being apprised of the obstacles private litigants were encountering in enforcing liabilities for inaccurate or misleading disclosures.[253] And, Con-

[251] See, *e.g.*, *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (C.A. 2, 1969); *Iroquois Indus., Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969 (C.A. 2, 1969), *certiorari denied*, 399 U.S. 909 (1970); *Electronic Speciality Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-941 (C.A. 2, 1969).

[252] See, *e.g.*, Kennedy, *Tender Moment*, 23 Bus. Law. 1091, 1114 (1968); Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon*, 5 Harv. J. Legis. 431, 444 (1968). Fleischer & Mundheim, *Corporate Acquisition By Tender Offer*, 115 U. Pa. L. Rev. 317 (1967).

[253] House Hearings, p. 59.

An early Commission memorandum suggesting the need for a misleading statements provision—ultimately enacted as Section 14(e)—noted that such a section would provide "a more practical means of preventing inaccurate or incomplete presentations * * * by persons opposing or favoring * * * tender offers * * * especially * * * in view of the shortness of time for such persons to act after the tender offer is made * * *" 112 Cong. Rec. 19003 (1966). Implicit in providing a "more practical means" of enforcing the obligations of Section 14(e) is the necessity of providing a private rem-

gress expanded Section 14(e) in 1970; by that time, the courts already had taken major steps toward defining the widest possible extent of standing under the Act.[254]

With no specific references in the legislative history to deny private actions, both explicit and implicit references to the need for, and desirability of, private enforcement of the provisions of the Williams Act, and the decision by Congress to place the Williams Act in Section 14 of the Securities Exchange Act with the proxy provisions where private remedies had been recognized, Congress was well aware of the likely impact of its actions. Thus, implication of a legitimately anticipated private cause of action for Williams Act violations is consistent with the second standard set forth in *Cort*.

C. It is Consistent with the Underlying Purposes of the Legislative Scheme of the Williams Act to Imply a Private Remedy for Tender Offerors.

In *Cort* v. *Ash*, *supra*, a third factor identified as relevant to the implication of a private remedy is whether such a remedy is consistent with the legis-

---

edy. And, to give full effect to that remedy, each party referred to, as a participant in the tender offer contest, must have standing to pursue it.

[254] See, *e.g.*, *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842 (C.A. 2, 1970); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (C.A. 2, 1969); *Iroquois Indus. Inc.* v. *Syracuse China Corp.*, *supra*, 417 F.2d 963; *Electronic Speciality Co.* v. *International Controls Corp.*, 409 F.2d 937 (C.A. 2, 1969).

lative scheme involved. In *Borak*, private remedies were found to be a necessary supplement to Commission actions; for much the same reasons, private remedies under the Williams Act are also such a necessary supplement, and are consistent with the legislative scheme. These conclusions are buttressed, in part, by reference to the judicial expansion of private rights under both the proxy and tender offer provisions of the Securities Exchange Act. The history of these cases evidences that, in order to effectuate the purposes of the Act, the courts indeed have been "alert" [255] to fashion appropriate principles of standing and necessary policies for effective relief.

1. *Private Rights of Action Are a Necessary Supplement to Commission Action to Make Effective the Congressional Purpose in Enacting the Williams Act.*

The Commission's administration of the Williams Act necessarily imposes heavy burdens on it, and these burdens have been increasing. Thus, the Commission:

—(1) receives filings made pursuant to Sections 13(d)[256] and 14(d)[257] of the Act on Commission forms Schedule 13D[258] and 14D[259] respectively—filings that have, in

---

[255] *J. I. Case Co.* v. *Borak*, 377 U.S. at 433.

[256] 15 U.S.C. 78m(d).

[257] 15 U.S.C. 78n(d).

[258] The information to be included in a Schedule 13D is set out at 17 C.F.R. § 240.13d-101.

[259] The information to be included in a Schedule 14D is set out at 17 C.F.R. § 240.14d-101.

the aggregate, increased in number from 321 to 1,184 in the past 6 years;[260]

—(2) reviews the information filed, both to determine whether there has been compliance with the governing provisions and conformity with representations contained in reports and other filings made by the participating parties pursuant to other statutory requirements; [261]

—(3) responds to information and complaints received from the target, its shareholders, securities exchanges, market professionals, etc.; and

—(4) litigates to cure such violations as its resources permit.[262]

---

[260] In fiscal year 1969, the first year of the effectiveness of the Williams Act, there were 251 acquisition, or Schedule 13D, filings, and 70 tender offer, or Schedule 14D, filings. By fiscal year 1976, these figures had increased to 1,077 and 107, respectively.

[261] For example, the staff of the Commission's Division of Corporation Finance often reviews, in connection with filings made pursuant to the Williams Act, prior annual reports filed pursuant to Section 12, 15 U.S.C. 78*l*, on Form 10-K and conducts related computer inquiries to verify information filed. The staff's review may also involve referrals to and consultation with other Divisions of the Commission and other state and federal agencies. In one situation, Societe Imetal's tender offer for the common stock of Cooperweld Corporation, for example, the Commission's staff consulted with, among others, the Departments of Justice, Treasury, Defense and Commerce, on specific questions arising out of the information filed.

[262] Reflecting its limited resources and reliance upon private actions, the Commission has brought very few suits alleging violations of Section 14(e), as opposed to the reporting provisions, of the Williams Act. A search of the Commission's files reveals that seven such actions have been brought since 1968. Three of these suits are pending, *Securities and Exchange Commission* v. *Thermal Power Co.*, Civ. No. 75-2000 (LHB) (N.D. Cal.); *Securities and Exchange Commission* v. *Mize, et al.*, Civ. No. 75-H-1420 (S.D. Tex.); *Securities and Exchange Commission* v. *Roussel, et al.*, Civ. Action No. 76-2571 (E.D. La.); a consent injunction has been obtained in two, *Securities and Exchange Commission* v. *CINKE Int'l Corp., et al.* (D. D.C.), SEC Lit. Rel. Nos. 5386 (Apr. 26, 1972) and 5465 (Jul. 17, 1972); *Securities and Exchange Commission* v. *General Host Corp., et al.*, 73-Civ.-275 (S.D. N.Y.), a partial consent judgment has been entered in one, *Securities and Exchange Commission* v. *Medic-Home Enterprises, Inc., et al.*, Civ. No. 75-6227 (S.D. N.Y.), and the Commission is considering taking an appeal from an order dismissing the complaint in *Securities and Exchange Commission* v. *Roven, et al.*, Civ. No. 75-3413 (C.D. Cal.).

The dramatic increase in the number of tender offers in recent years,[263] increases in the Commission's regulatory and enforcement responsibilities in other areas, as well as the fact that, particularly in the tender offer area, "[t]he Government's ingenuity is frequently no match" for the ingenuity of those in the contest,[264] have strained the Commission's limited resources.[265]

The major restraints on the Commission's staff in this area are aggravated by the fact that the economic, business and methodological complexities of tender offers need closer attention than even the most vigilant governmental agency can hope to provide

---

[263] See pp. 25-26, 96, *supra*.

[264] House Hearings, p. 22.

[265] The professional staff of the Commission's Office of Tender Offers, Acquisitions and Small Issues consists of five professional persons.

within the brief, but full, fury of a contested tender offer. The speed with which the Commission is called upon to act was emphasized to the Congress during its consideration of the Act:

> "The pace of tender offers accelerates and we have received from numerous Members of Congress many businessmen, lawyers, and State and local officials expressions of serious concern with respect to various takeover bids which have been attracting so much attention. Allegations of fraudulent or improper practice are frequent. In fact, they are usual, and litigation alleging fraud by one side or the other in a contested tender offer occurs almost weekly. It is almost standard operating procedure.
>
> "We have had to respond that we will investigate allegations of fraud to the extent that they fall within our jurisdiction, and indeed we have. But, owing to the time required for such investigations, it may be that the tender offer will be all over before the investigation is completed." [266]

The timing in tender offers is even more critical than this Court found to exist with respect to proxy solicitations in *Borak, supra*, 377 U.S. at 432.[267] In any event, for both proxy contests and tender offers,

> "Time does not permit an independent examination of the facts set out in the * * * material [filed] and this results in the Commission's acceptance of the representations contained there-

[266] House Hearings, p. 19.

[267] 1 Flom, Lipton & Steinberger, *Takeovers and Takeouts —Tender Offers and Going Private* 10-11 (Law Jl. Pr., 1976); Aranow & Einhorn, *Tender Offers for Corporate Control* 10-11 (1973).

> in at their face value, unless contrary to other material on file with it." [268]

Moreover, unlike proxy soliciting materials, which are submitted for staff review and comment before a formal "filing" is made, and registration statements, for which there is a statutory "waiting period" permitting staff review, the Williams Act does not provide the Commission an opportunity for review of and comment on filed materials before requests or invitations for tenders are made to offerees.[269] And, the contest can be completely won or lost during the ten day period that Section 14(d)(6) of the Act requires the offer to be kept open.[270]

During the hearings, Chairman Cohen had vigorously contended that prefiling of soliciting material by offerors had worked well under the proxy rules, and would "serve the best interests of the shareholder." [271] He advised that an undesirable alternative to prefiling would be court action, but Congress declined to tip the scales against offerors by requiring prefiling.[272]

[268] *Borak, supra*, 377 U.S. at 432.

[269] Senate Report, p. 4.

[270] That provision, in effect, requires that a tender offer be kept open for a minimum period of 10 days when "less than all the outstanding equity securities of a class" are being sought. Section 14(d)(5) of the Act has the effect of requiring that a tender offer be kept open for at least seven days, when the offer is for all of the stock.

[271] House Hearings, p. 18.

[272] As noted at pp. 27-31, 49-50, *supra*, the element of surprise is important to offerors. If management is apprised too

While court action by the Commission is always a possibility, if it is to be effective it must come at an early stage in the tender offer process, before it becomes difficult, if not impossible, to "unscramble the eggs." [273] But, aside from the practical infirmities preventing Commission suits at the incipient stages of a tender offer, such suits by the Commission unfortunately could also conflict with the "extreme care" employed by Congress to avoid tipping the scales in favor of either side. As Chairman Cohen emphasized, Commission suits could be used as an argument that "the government is against you":

> "I think that our concern really stems from our sensitivity that the Government should stay out of involvement in these contests as much as possible. * * * We just did not want the Commission to be in the position perhaps of compelling changes or going to court because once you do that no matter how well you qualify what you are doing it is going to be used by the other parties as an argument that 'the Government is against you.' This is the reason why the Commission hesitates, unless no other course is possible, to go to court on these situations.[274]

---

early of an impending tender offer, it can use its effective weapons to thwart the offer before it ever gets started. Flom, Lipton & Steinberger, *supra*, at 12-13.

[273] *Sonesta International Hotel Corp.* v. *Wellington Assoc.*, 483 F.2d 247, 250 (C.A. 2, 1973).

[274] House Hearings, p. 53. See also, Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 361 (1967). Private lawsuits, on the other hand, do not present the danger of tipping the scales in favor of one side or the other.

In this regard, the views of the Commission expressed by Chairman Cohen echoed the sentiments espoused a decade earlier by then Commission Chairman Armstrong, who commented to the Congress on the Commission's role in proxy contests:

> "The Commission makes no attempt to guide, control or interfere in the strategy of participants in a contest for control. * * * The Commission is and must be scrupulously neutral; it neither takes sides nor plays favorites in proxy contests." [275]

In declining to require prefiling of tender offers,[276] Congress opted instead for "a more practical means of preventing inaccurate or incomplete presentations" [277]—Section 14(e)—even though such a provision would aid offerors.

The Commission must rely to a great extent, therefore, on private enforcement of the provisions of the Act by the parties involved. "[T]here is no policeman so effective as the one whose pocketbook is af-

---

[275] Senate Committee on Banking and Currency, *Hearings on S. 879*, 84th Cong., 1st Sess. 1695 (1956).

[276] The bill would not have required materials used in opposition to any tender offer to be prefiled and solicitations in opposition to exchange offers would have been exempt from Section 14(d)(4) coverage. Thus, at the time of the House Hearings, only Section 14(e) could have covered inadvertant misstatements and omissions by both parties. Both Professor Mundheim and Ralph Saul, the president of the American Stock Exchange, had testified that the Section 14(e) protections would prevent such inaccurate statements. See Senate Hearings, pp. 99, 125.

[277] 112 Cong. Rec. 19005 (1966).

fected by the degree to which he enforces the law." [278] He alone has the greatest "incentive to detect violations and vigorously pursue remedies," all in furtherance of the purposes of the Act.[279]

No less so than with respect to proxies, private enforcement by those with a sufficient economic stake in the imposition of the law's requirements under the Williams Act *is* a "necessary supplement to Commission action * * * necessary to make effective the Congressional purpose." *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 432-433.

> "Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public in their capacities as investors *or competitors*, which incidentally benefit the general public interest, perform a vital public service."

Gulf & Western Industries, Inc. v. *Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687, 699 (C.A. 2, 1973) (emphasis supplied).[280]

---

[278] See pp. 76-77, *supra*.

[279] *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (C.A. 1, 1973).

[280] Underlying this Court's decision in *Borak*, is a recognition that, in the absence of implied remedies, the Commission itself will be required to pursue such violations, increasing governmental intervention, rather than decreasing it,

2. *Judicial Determinations Under the Proxy Regulation Provisions of the Securities Exchange Act Have Provided Those Private Remedies Necessary to Make Effective the Congressional Purpose.*

Judicial determinations recognizing that private parties have a right under Section 27 of the Securities Exchange Act to bring suit for violations of Section 14(a) of that Act are consistent with the "duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional 'purpose'," *J. I. Case Co.* v. *Borak*, 377 U.S. at 433. Responding to that duty, the courts have liberally and justifiably [281] afforded standing to proxy contestants as well as shareholders to effect the broad remedial purposes of the Act. The decisions of the lower federal courts reflect an inclination to adjust and broaden concepts of standing whenever it appears that more restrictive approaches could frustrate and impede the Congressional intent underlying the proxy provisions.

Thus, at least a decade before this Court's decision in *Borak*, *supra*, Section 14(a) of the Act generally was presumed to afford shareholders a private right

---

and, perhaps, in order to do the same job, requiring for the Commission

> "a blank check appropriation which we will never have and which we cannot responsibly seek * * *."

Fundamental Investors Inc., 41 S.E.C. 285, 302-303 (1962) (concurring opinion of Commissioner Whitney).

[281] See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

of action,[282] notwithstanding the fact that the Securities and Exchange Commission had the express right to bring suit to enforce the provisions of that Section.[283] But, in the earliest cases, the plaintiffs most likely to succeed on the merits in an action under Section 14(a) were those whose litigation was contemporaneous with an action by the Commission against the same defendant or who were otherwise able to overcome the deference accorded by some courts to the Commission staff's review of proxy material.[284] Requiring either the concurrence or assist-

[282] See, *e.g.*, *Textron, Inc.* v. *American Woolen Co.*, 122 F. Supp. 305, 308 (D. Mass., 1954); *Mack* v. *Mishkin*, 172 F. Supp. 885, 888, (S.D. N.Y., 1959).

[283] *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201, 208 (C.A. 6, 1961); see also, Section 21 of the Securities Exchange Act, 15 U.S.C. 78u.

[284] *Mack* v. *Mishkin*, 172 F. Supp. 885, 888 (S.D. N.Y., 1959). See also *Doyle* v. *Milton*, 73 F. Supp. 281, 285-286 (S.D. N.Y., 1947), in which the court relied upon interpretive statements of the Commission; *Dunn* v. *Decca Records*, 120 F. Supp. 1, 2 (S.D. N.Y., 1954), in which the court relied upon an "informal opinion" from an official at the Commission; the consolidated cases of *Central Founding Co.* v. *Gondleman* and *Securities and Exchange Commission* v. *Gondleman*, 166 F. Supp. 429 (S.D. N.Y., 1958) where the court, in granting an injunction in favor of the corporate plaintiff, was apparently swayed by the fact that the Commission had made extensive comments on the committee's proxy material and had ordered its own investigation in connection therewith; *United Industrial Corporation* v. *Henwood*, CCH Fed. Sec. L. Rep. ¶ 91,142 (S.D. Cal., 1962), with facts similar to *Gondleman* except that the Commission chose to bring a separate action rather than intervene on the plaintiff's behalf; and *Securities and Exchange Commission* v. *Henwood*, CCH Fed. Sec. L. Rep. ¶ 95,125 (S.D. Cal., 1961), *affirmed*, 298 F.2d 641 (C.A. 9, 1962) where both the incumbent management and the Commission obtained injunctions against the voting of proxies obtained in response to proxy material which failed to reveal the identity of the principal members of the opposition committee.

ance of the Commission before a suit could be brought by a shareholder purportedly injured by a violation of Section 14(a) was a decided disadvantage—particularly for any private party whose claim arose from proxy material about which the Commission might have had some doubt, but which it did not think justified enforcement action in light of its administrative limitations.

The need for an unfettered right of private action to supplement the limited resources of the Commission became more apparent with the passage of time, the proliferation of public corporations, and the increased use of proxy contests as a means of gaining corporate control. It finally was recognized in *Dann* v. *Studebaker-Packard Corp.*, where the Sixth Circuit held that:

> "* * * a private investor who has been injured by a violation of this section [Section 14(a)] may bring an action in his own behalf, and he does not have to wait for the SEC to bring it for him." [285]

Three years later, this Court in *Borak* confirmed that holding, finding such a right "clear" in light of Section 27 of the Act, and because "the Court

[285] 288 F.2d 201, 209 (1961).

agreed that private enforcement of the proxy rules was a necessary supplement to SEC enforcement." *Securities Investor Protection Corporation* v. *Barbour*, 421 U.S. 412, 424 (1975).

In *Borak*, however, private rights of action under Section 14(a) were not restricted to shareholders. Instead, taking a more expansive view of the Congressional purpose in adopting Section 14(a), and why private actions would not only be consistent with, but further, that purpose, this Court asserted:

> "The damage suffered results not from the deceit practiced on [the stockholder] alone but rather from the deceit practiced on the stockholders as a group."

Id., at 432.

Using this conclusion to justify the implication of derivative actions as well as direct suits to vindicate Section 14(a),[286] this Court also struck down artificial

---

[286] *Borak* conclusively established the right of private enforcement in derivative (see, *e.g.*, *Dillon* v. *Berg*, 326 F. Supp. 1214 (D. Del., 1971), *affirmed*, 453 F.2d 876 (C.A. 3, 1971)), or shareholder actions. As a result, standing to sue no longer is placed in issue, and resolution of the cases generally depends on such substantive matters as the materiality of the alleged misstatement, (see, *e.g.*, *Swanson* v. *American Consumers Indus., Inc.*, 475 F.2d 515 (C.A. 7, 1973)); the causal relationship between the misstatement in the proxy material and the consummation of the transaction (see, *e.g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)); the standard of liability to be applied to the officers and directors responsible (see, *e.g.*, *Norte & Co.* v. *Huffines*, 416 F.2d 1189 (C.A. 2, 1969), *affirming*, 304 F. Supp. 1096 (S.D. N.Y., 1968)); the damages to be awarded (see, *e.g.*, *Ohio Drill & Tool Co.*

barriers that some courts had attempted to erect to meaningful relief.[287] Rejecting the proposition that federal jurisdiction was limited to declaratory or prospective relief only,[288] this Court reaffirmed that,

> "* * * where legal rights have been invaded, and a federal statute provides for *a general right to sue* for such invasion, federal courts may use any available remedy to make good the wrong done." [289]

Since *Borak*, the courts have continued to adjust concepts of standing in implied actions under the Commission's proxy rules, to foster the underlying Congressional intent. In so doing, standing has liberally been accorded to the contestants in proxy contests.

One of the earliest proxy contests in which it was explicitly held that a target corporation had a private right of action to sue an insurgent for violation

---

v. *Johnson*, 498 F.2d 186 (C.A. 6, 1974)); the financial injury suffered (see, *e.g.*, *Berman* v. *Thomson*, 312 F. Supp. 1031 (N.D. Ill., 1970)); the practicality of injunctive relief (see, *e.g.*, *Denison Mines Ltd.* v. *Fibreboard Corp.*, 388 F. Supp. 812 (D. Del., 1974)); or retrospective relief (see, *e.g.*, *Beatty* v. *Bright*, 318 F. Supp. 169 (1970), *supplemented by* 345 F. Supp. 1188 (S.D. Iowa, 1973)).

[287] See, *e.g.*, *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201 (C.A. 6, 1961).

[288] 377 U.S. at 431-433.

[289] 377 U.S. at 433. See also *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 424 (1975).

of the proxy rules was *Studebaker Corp.* v. *Gittlin* [290] and the related litigation in Michigan of *Studebaker Corp.* v. *Allied Products Corporation.*[291] The *Gittlin* litigation in New York, and the *Allied* litigation in Michigan, took place contemporaneously and, in both instances, the "insurgent" defendant sought to have the claim under Section 14(a) dismissed on the ground that the corporate target had no standing to bring the action. This claim was rejected in both courts.[292] And the right of a target corporation and its management to bring a private action for violation of Section 14(a) against insurgent shareholders or outsiders in a proxy contest is now so well-established,[293] that in most instances, the question of standing is neither questioned nor discussed.[294]

[290] 360 F.2d 692 (C.A. 2, 1966).

[291] 256 F. Supp. 173 (W.D. Mich., 1966).

[292] The *Gittlin* court in New York held:

> "management has a role to play as such and not merely insofar as the managers are stockholders. Moreover, it is common knowledge that a contest for control may be only the prelude to an arguably damaging transaction to be carried out by the winner with the aid of the corporate proxy machinery or even without further shareholder votes." 360 F.2d at 695.

See also, Greater Iowa Corp. v. *McLendon,* 378 F.2d 783, 794 (C.A. 8, 1967); *General Time Corp.* v. *Talley Indus., Inc.,* 403 F.2d 159, 161 (C.A. 2, 1968); *Bound Brook Water Co.* v. *Jaffee,* 284 F. Supp. 702 (D.N.J., 1968).

[293] See, *e.g., Dillon* v. *Berg,* 326 F. Supp. 1214, 1218 n.2 (D. Del.), *affirmed,* 453 F.2d 876 (C.A. 3, 1971): "The corporation itself has a right to bring a suit for a violation of Section 14(a)" [citing *Gittlin, supra,* and *Talley, supra*].

But, the private right of action established by *Borak,* and particuarly the legislative goals it seeks to implement, extend equally to the insurgent corporate contender engaged in a proxy solicitation for the purpose of displacing incumbent management. While the insurgent is invariably a shareholder of the target company, and its standing to sue for violations of the proxy rules presumably might be justified on that basis, its primary interest in the enforcement of the proxy rules differs from that of the ordinary shareholder-investor. Since the injury resulting to an insurgent from a violation of the proxy rules by incumbent management likely affects the insurgent's plans for a merger or acquisition, the Congressional concern to prevent proxy violations from entrenching incumbent management [295] supports the recognition of the corporate contender's standing to sue in its primary capacity.

The interest which the insurgent proxy contender has in a private right of action is not dependent on, and does not derive from, its status as shareholder, notwithstanding *Borak's* affirmation of its right to bring suit as such. The shareholder-investor most often seeks to preserve the value of his investment;

[294] See, *e.g., Water & Wall Assoc., Inc.* v. *American Consumer Indus., Inc.,* CCH Fed. Sec. L. Rep. ¶ 93,943 (D.N.J., 1973); *Twentieth Century Fox Film Corporation* v. *Lewis,* 334 F. Supp. 1398 (S.D.N.Y., 1971); *Universal Container Corp.* v. *Slade,* CCH Fed. Sec. L. Rep. ¶ 93,005 (S.D.N.Y. 1971).

[295] See, *e.g.,* S. Rep. No. 1455, 73d Cong., 2d Sess. 77 (1934).

to that end, he has an interest in ensuring that the proxy rules are not used to obtain shareholder approval of a transaction that would deplete the corporate assets,[296] put incompetent or self-aggrandizing management in charge,[297] or subject the corporation to liability.[298] On the other hand, the corporation which acquires stock in another company for the purpose of gaining control thereof is interested not in the maintenance of the target in existing form, but in the alteration of the latter's capital structure, management, business, or whatever other element is central to the overall plan.

Union Pacific Railroad Co. v. *Chicago & North Western Railway Co.*,[299] was the first case to recognize the dual status of such an insurgent corporation explicitly, in a suit between two railroad companies arising out of their competing efforts to use the proxy solicitation mechanism to take over a third. In rejecting the contention that Union Pacific should have no private right of action, the court held that

---

[296] *Norte & Co.* v. *Huffines*, 416 F.2d 1189 (C.A. 2, 1969) *affirming*, 304 F. Supp. 1096 (S.D. N.Y., 1968).

[297] *Doyle* v. *Milton*, 73 F. Supp. 281 (S.D. N.Y., 1947); *Ohio Drill & Tool Co.* v. *Johnson*, 498 F.2d 186 (C.A. 6, 1974).

[298] *Beatty* v. *Bright*, 318 F. Supp. 169 (1970), *supplemented*, 345 F. Supp. 1188 (S.D. Iowa, 1972).

[299] 226 F. Supp. 400, 406 (N.D. Ill., 1964), cited with approval in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970) and in *Electronic Speciality Co.* v. *International Controls Corp.*, 409 F.2d 937, 946 (1969).

> "the Union Pacific has standing sufficient to maintain this action to complain of the alleged violations. It is a joint owner of some 24,000 shares of Rock Island common stock and holds a proxy to vote that stock at the meeting in question. It is also a party to the provisional contract of merger which is to be approved or disapproved at the meeting. *In either capacity, the Union Pacific has a genuine interest in assuring that the merger should not be defeated by prohibited conduct*" (emphasis supplied).

Subsequent cases have recognized the potential injury to a corporate proxy contender from fraudulent solicitation by its opponents in suits which entertained such claims on the merits without finding it necessary to address the standing question directly.[300] The damages which such a corporation stands to suffer, if it sustains its claims on the suits (*viz*: defeat of it merger or acquisition plans) affects it more directly in its capacity as contestant than as shareholder. The difference between the ordinary shareholder and the insurgent proxy contestant has not affected the right of insurgents to maintain private actions under Section 27. While the interests and goals of the two vary, they share a common interest in enforcement of the proxy provisions, since the loss of a proxy contest precipitated by violative conduct

---

[300] See, *e.g.*, *U.S. Smelting, Refining & Mining Co.* v. *Clevite Corp.*, CCH Fed. Sec. L. Rep. ¶ 92,691 (N.D. Ohio, 1968); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (C.A. 2, 1969) and related litigation in *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332 (C.A. 2, 1973).

is a breach of a duty arising under these provisions. *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. 426. Since "[t]he legislative history of the Exchange Act indicates that the Congress was concerned with the abuse of proxies by seekers of corporate power as well as by management," [301] if insurgents were unable to contest a proxy solicitation, a curious dichotomy would result: the target corporation and its shareholders could sue competing interests for violations of Section 14(a),[302] but would themselves, be immune from suit by the competing corporation. That would destroy the very equality of opportunity intended to be provided in the proxy provisions. In adhering to this Court's teachings in *Borak* and liberally finding standing to sue for proxy violations, the lower courts have not permitted the essential equality of opportunity in proxy contests to be eroded.

3. *Prior Judicial Determinations Under Section 14(e) of the Williams Act Have Mirrored Actions by the Courts in Providing Private Remedies to Proxy Contestants and Shareholders Necessary to Make Effective the Congressional Purpose in Enacting the Williams Act.*

As we have seen, Congress recognized, in enacting the sweeping provisions of the Williams Act, includ-

[301] Senate Committee on Banking and Currency, *Hearings Before a Subcommittee on S. 879*, 84th Cong., 1st Sess. 1695, 1696 (1956).

[302] See pp. 107-111.

ing Section 14(e), that the predictable consequences would include the implication of private remedies consonant with those provided in the proxy area. The courts have seized upon the protective provisions of the Williams Act, and the general right in Section 27 of the Act to permit private actions by shareholders, target corporations and tender offerors to "make effective the Congressional purpose." *Borak*, *supra*, 377 U.S. at 432; *Cort* v. *Ash*, 422 U.S. 66.

Unlike the proxy regulations, where there exists a statutory scheme which initially appeared to some courts to require deference to the Commission's review of filed material, shareholders seeking to enforce private rights under the Williams Act have not been required to demonstrate Commission approval of, or acquiesence in, a private action. Shareholders who have tendered their securities in response to a tender offer have standing to sue the offeror for either injunctive relief [303] or monetary damages.[304] And, because Section 14(e) does not contain the restricting, "in connection with the *purchase or sale*" language of Section 10(b), nontendering shareholders have been found to have standing to sue both indivi-

[303] See, *e.g.*, *Broder* v. *Dane*, 384 F.Supp. 1312 (S.D. N.Y., 1974).

[304] See, *e.g.*, *Lowenschuss* v. *Kane*, 520 F.2d 255 (C.A. 2, 1975).

dually [305] and derivatively [306] for both injunctive relief [307] and monetary damages [308]—irrespective of the independent standing of the target to sue on its own behalf.[309] Standing has neither been denied to target shareholders suing the target itself [310] nor when seek-

---

[305] *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 (C.A. 5), *certiorari denied*, 419 U.S. 873 (1974); *Spielman* v. *General Host Corp.*, 402 F. Supp. 190 (S.D. N.Y., 1975), *affirmed*, Docket 75-7538, slip opinion (C.A. 2, July 12, 1976); *McCloskey* v. *Epko Shoes, Inc.*, 391 F. Supp. 1279 (E.D. Pa., 1975); *Petersen* v. *Federated Development Co.*, 387 F. Supp. 355 (S.D.N.Y., 1974).

[306] See, *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d at 596.

[307] See, *e.g.*, *McCloskey* v. *Epko Shoes, Inc.*, *supra*, 391 F. Supp. at 1282; *Petersen* v. *Federated Development Co.*, *supra*, 387 F. Supp. 355.

[308] See, *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d 579; *Spielman* v. *General Host Corp.*, *supra*, 402 F. Supp. 190; *McCloskey* v. *Epko Shoes, Inc.*, *supra*, 391 F. Supp. 1279; *Petersen* v. *Federated Development Co.*, *supra*, 387 F. Supp. 355; *Fabrikant* v. *Jacobellis*, CCH Fed. Sec. L. Rep. ¶ 92,686, (E.D. N.Y., 1970) *Dyer* v. *Eastern Trust and Banking Co.*, 336 F.Supp. 890 (D. Me., 1971).

[309] See *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 946: "The rights of the nontendering stockholders and the corporation thus seem sufficiently independent to give standing to both under all the provisions added to § 14."

[310] See, *e.g.*, *Neuman* v. *Electronics Speciality Co.*, CCH Fed. Sec. L. Rep. ¶ 92,591 (N.D. Ill., 1969). See also *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 423 (C.A. 1, 1973).

ing injunctive or monetary relief from targets and allied offerors.[311]

The standing of a target company to sue the tender offeror under Section 14(e) was also confirmed early in the judiciary's review of the Williams Act. See, *e.g.*, *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937 (C.A. 2, 1969). Those cases reflect a recognition that the target company could well be harmed by the misrepresentations and omissions of a tender offeror. And, while individual shareholders of the target would undoubtedly have a right to sue under the Williams Act for damages to their corporation, it was concluded that the superior resources of the corporation were vitally needed if a timely and effective attack were to be made on illegal offers. *Id.* at 946.

---

[311] *Petersen* v. *Federated Development Co.*, *supra*, 387 F. Supp. 355. See also, *Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d at 598 (footnote omitted):

> "[I]f there is danger that an investor may be misled by management of the target company or the tender offeror in a situation where these two are hostile, there is no reason to assume that the danger will be lessened when both are on the same side of the fence. Indeed, investors would seem to require greater protection in this situation. *Cf. Electronic Specialty Co.* v. *International Controls Corp.*, 2 Cir. 1969, 409 F.2d 937, 946."

Congress also was aware of the need for protection where the tender offer was made by a person friendly to management. See Senate Hearings, p. 144. In those circumstances, the offeror becomes "a member of the coterie which surrounds management." *Id.*

Since 1969, therefore, a target company's standing to seek injunctive relief against a tender offeror for violations of Sections 14(d) and (e) has been accepted universally, often with little or no discussion.[312]

The standing accorded to management is but a reflection of the fact that any private action, whose goal is to redress violations of the Act's provisions, even if motivated by personal or pecuniary interest, will foster the Congressional purpose. In the end, the shareholders will be the beneficiaries of private actions involving violations that the Commission either could not detect, or could not prosecute in a timely fashion. The same reasoning supports standing for defeated offerors.

---

[312] *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842 (C.A. 2, 1970); *Gulf & Western Indus.* v. *Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (C.A. 2, 1973); *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 423 (C.A. 1, 1973); *Sonesta International Hotel Corp.* v. *Wellington Assoc.*, 483 F.2d 247 (C.A. 2, 1973); *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 497 F.2d 394 (C.A. 3, 1974), *affirming*, 370 F. Supp. 597 (D. N.J., 1974); *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579 (W.D. Pa., 1975); *Texasgulf, Inc.* v. *Canada Development Corp.*, 366 F. Supp. 374 (S.D. Tex., 1973); *MGM, Inc.* v. *Transamerica Corp.*, 303 F. Supp. 1344 (S.D. N.Y., 1969); *Otis Elevator Co.* v. *United Technologies Corp.*, 405 F. Supp. 960 (S.D. N.Y., 1975); *D-Z Investment Co.* v. *Holloway*, CCH Fed. Sec. L. Rep. ¶ 94,771 (S.D. N.Y., 1974). *Commonwealth Oil Refining Co.* v. *Tesoro Petroleum Corp.*, 394 F. Supp. 267, 273 (S.D. N.Y., 1975); *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 872 (C.A. 2), *certiorari denied*, 419 U.S. 883 (1974); *Cattlemen's Investment Co.* v. *Fears*, 343 F. Supp. 1248, 1252 (W.D. Okla., 1972); *Corenco Corp.* v. *Schiavone & Sons, Inc.*, 498 F.2d 207 (C.A. 2, 1973); *Jewelcor, Inc.* v. *Pearlman*, CCH Fed. Sec. L. Rep. ¶ 95,096 (S.D. N.Y., 1975).

But for offerors, there are other bases as well that the courts have utilized to justify standing to sue for tender offer violations—and those bases are equally productive in light of the Congressional intent underlying Section 14(e). Insurgents, whether shareholders or not (and, as is true here, they usually are), have a definite pecuniary interest in the outcome of the contest. If management is free to violate the Williams Act, but the insurgent, even though that violation redounds to its detriment, cannot maintain a law suit to correct the violation or compensate itself for damages suffered, then the scheme of tender offer regulation Congress so painstakingly sought to create would be little better than a mirage, denying the substantive benefit its remedial provisions were intended to effect, including the benefits intended for shareholders. Worse, if management can sue, as *Borak* and its progeny have held it can, to correct or penalize the insurgent for its violations, but the offeror cannot sue to correct management's violations, then the clearly articulated Congressional intent not to "tip the balance" in a tender offer contest is thwarted, not aided, by the recognition of private remedies—a result this Court surely did not intend in deciding *Borak*, and a result wholly at odds with the Congressional scheme.

Thus, when the question whether a thwarted tender offeror had standing under Section 14(e) to sue a target and its ally was first raised in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (C.A. 2, 1969), the court commented that

> "The amendment to the Act adding section 14 (e) * * * effective July 29, 1968, subsequent to the events here in question, should serve to resolve any doubts about standing in the tender offer cases, even when an offeror is not, as is Crane, in the position of a forced seller." [313]

The court below followed *Crane's* instruction,[314] as have all other courts *directly* confronted with the issue.[315] Thus, in *Mesa Petroleum Co.* v. *Aztec Oil &*

---

[313] 419 F.2d at 798-799. The action in *Crane* was predicated upon Rule 10b-5, since the events in question had occurred prior to the effective date of the Williams Act.

[314] See A. 29-30.

[315] See, *e.g.*, *H. K. Porter Co.* v. *Nicholson File Co.*, *supra*, 482 F.2d 421; *Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d 579; *Sargent* v. *Genesco, Inc.*, 492 F.2d 750 (C.A. 5, 1974); *Dyer* v. *Eastern Trust and Banking Co.*, *supra*, 336 F. Supp. 890.

There is no support for the isolated *dictum* in *Klaus* v. *Hi-Shear Corp.*, 528 F.2d 225, 232 (C.A. 9, 1975), that "the Williams Act was designed to protect cash tender offerees not offerors." In any event, it appears that, in *Klaus*, the court itself presumed standing and disposed of the action on the appropriateness of the remedy sought. *Id.*, at 232. And the Ninth Circuit's reliance in *Klaus* on this Court's decision in *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49 (1975), was seriously misplaced. A careful reading of the Court's decision in *Rondeau* fails to elicit the slightest support for the above-quoted *dictum*. Not only did this Court delimit the issue before it to a determination of the availability of a remedy for an acknowledged violation of Section 13(d)(1) by a failure to file form Schedule 13D, but the Court in *Rondeau* did not consider the issue of standing. It did, however, indicate the "dilemma" which led to the passage of the Williams Act, but did not consider the solution which the Williams Act provides. The Court in *Klaus* neither referred to determinations made

Gas Co., 406 F.Supp. 910 (N.D. Tex., 1976), an offeror sued the target under Section 14(e) for an injunction prohibiting interference with its planned communications to target shareholders and employing false and misleading statements in waging its defense. The target counterclaimed for injunctive relief, and questioned the tender offeror's standing to bring suit under Section 14(e), "since it is not a stockholder of [the target]." 406 F.Supp. at 912 n. 2.

The district court examined the provisions of Section 14(e), and observed that Section "14(e) on its face is a kinsman of the proxy rules. Congress had that kinship in mind when it created the Williams Act." *Id.*, at 913. It was against this "background" as well as the admonitions from this Court in *Borak*, *supra*, 377 U.S. at 433, that the court rejected the challenge to the offeror's standing. Relying upon an opinion of the Fifth Circuit, which had commented that "the right to bring suit has not been limited to tendering offerees but has been extended to numerous other parties who claimed to be victims of 14(e) violations," [316] the court noted that the Fifth Circuit

---

by the court below in this case, nor to any of the opinions of the other circuits supporting that decision.

[316] *Sargent* v. *Genesco, Inc.*, 492 F.2d 750 (C.A. 5, 1974). There the court of appeals reversed the district court's determination that plaintiff shareholders were entitled to recovery under Section 14(e) because they had "not alleged any inadequacy of disclosure" made to the offerees-holders of another class of securities, 492 F.2d at 769. But, the court recognized that:

> "Although section 14(e) does not expressly provide for a private right of action, courts have uniformly implied

had, in turn, "cited with approval" the decision of the Second Circuit in this case, as well as that of the First Circuit in *H. K. Porter Co.* v. *Nicholson File Co.*, *supra*, 482 F.2d 421.

In *H. K. Porter Co.*, *supra*, a tender offeror claimed that the target had violated Section 14(e) in communicating its defense to its shareholders. The target challenged the standing of the offeror to maintain an action against it, urging that "Porter's is not the interest which § 14(e) was designed to protect and that therefore we should not imply for it a right of action for damages." 482 F.2d at 423.

In concluding that H. K. Porter Co., the tender offeror, had standing to assert a claim for damages for the violations of the securities laws by the target,

---

one. *See Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d at 596 n. 20. In determining who has standing to sue under 14(e), the quest has been for what will best further the objective of the statute. Consequently, the right to bring suit has not been limited to tendering offerees only but has been extended to numerous other parties who claimed to be victims of 14(e) violations" (citations omitted).

In fact, the court in *Sargent* explicitly cautioned, citing *Dyer* v. *Eastern Trust and Banking Co.*, 336 F. Supp. 890 (D. Me., 1971), "where the court accorded standing to shareholders of the tender offeror," that:

> "we do *not* hold that the plaintiffs in the instant case would have no standing to sue under 14(e) *if there had been misleading statements* in the offer to debenture holders."

492 F.2d at 770 n. 28 (emphasis supplied). See also, *Washburn* v. *Madison Square Garden Corp.*, 340 F. Supp. 504, 509 (S.D. N.Y., 1972).

the First Circuit cogently and compellingly stated its rationale:

> "From the statutory scheme and the legislative history, it seems clear that the overriding purpose of § 14(e) is the protection of the investors. Yet affording for the offeror and the target's management a cause of action for damages would in many instances further that purpose. With an obvious economic stake in the outcome of the tender offer battle, they have the incentive to detect violations and vigorously pursue remedies. * * * *We see no reason why actions by the protagonists in the battle, as well as by the stockholders themselves, would not be effective enforcement weapons.*
>
> "We find further support for this construction when we look to the context in which § 14(e) was enacted. Rule 10b-5 already covered exchanges of stock generally, including tender offers, but rights of action under it were commonly limited to purchasers and sellers. * * * Since § 14(e) substantially tracks the language of 10b-5 except for its omission of the purchase and sale requirement, *it seems reasonable to conclude that its 'major contribution [was] a broader standing to sue—accorded both to the offeror and to the opposition.'*
>
> "Finally, implying for the offeror and the target's management reciprocal rights of action for damages seems only fair given that each has a heavy economic stake, and that each is subject

> to what has been aptly described as 'symmetrical' statutory obligations. * * * Each is victimized when the other commits illegal acts to defeat or accomplish takeover bids."

Id. at 424 (emphasis supplied).

Thus, the necessity of a supplement to Commission action in the tender offer area, as well as prior judicial determinations under the proxy and tender offer provisions of the Act to make effective the intent of the Congress, each demonstrate that the implication of private remedies under Section 14(e) is consistent with the underlying purposes of the legislative scheme. The courts thus have held that, in order to have standing to sue, the plaintiff must be either a participant in the tender offer contest or have a proprietary interest in such a participant.[317] The

[317] See, *e.g.*, *Alaska Interstate Co.* v. *McMillan*, 402 F. Supp. 532 (D. Del., 1975) (standing recognized for competing tender offerors to sue each other); *Emhart Corp.* v. *USM Corp.*, 403 F. Supp. 660 (D. Mass., 1975) *vacated on other grounds*, 527 F.2d 177 (1975) (tender offeror had standing under Section 14(e) to sue target company) *Cauble* v. *White*, 360 F. Supp. 1021 (E.D. La., 1973), *Wulc* v. *Gulf & Western Indus., Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,361 (E.D. Pa., 1975) (employee who had not exercised stock option held not to have standing).

In *Dyer* v. *Eastern Trust & Banking Co.*, *supra*, 336 F. Supp. 890, standing was granted to a shareholder of the tender offeror on the court's reading of the intent of Congress in enacting § 14(e) that "a determination that she has standing is both logical and compatible with the purpose of the statute." To determine who has standing, the "quest must be for what will best accomplish the purposes of the legislature." *Id.* at 914, quoting *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 946. The *Dyer* court concluded:

> "The purpose of Congress in enacting Section 14(e) was to protect the investing public from harm caused by misleading tender offers. *Shareholders of the offeror are plainly within the class for whom such protection was designed.* Plaintiff is such a shareholder, and effectuation of the Congressional purpose requires that she be granted standing to maintain the present suit" (emphasis supplied).

implication of private actions to offerors furthers the Congressional goal of providing even-handed protection to the various participants in tender offers, and also has a didactic effect in curbing the abuses Congress sought to remedy in enacting the Williams Act.

D. The Williams Act is an Intrusion of Federal Law into the Internal Affairs of Corporations and a Federal Remedy is Appropriate to Effect the Congressional Purpose to Provide Protections to Those Involved in a Tender Offer.

A final factor of importance relied upon by this Court in determining whether to imply a private remedy is whether the action is one traditionally relegated to state law, in an area of basic concern to the states, so that it would be inappropriate to infer a cause of action solely under federal law. *Cort* v. *Ash*, *supra*, 422 U.S. at 78. Here, as in *Borak*, there is a need to imply a private federal remedy, since the Williams Act is a clear intrusion into the internal affairs of corporations and an application of state law might serve to frustrate the Congressional purpose in enacting this federal legislation.

In *Borak*, this Court pointed to the evils inherent in relegating private parties to state law remedies—evils equally present in the tender offer area:

> "[I]f the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of the section might be frustrated. Furthermore, the hurdles that the victims might face (such as separate suits, as contemplated by *Dann* v. *Studebaker-Packard Corp.*, [288 F.2d 201], security for expense statutes, bringing in all the parties necessary for complete relief, etc.) might well prove insuperable to effective relief."

Borak, supra, 377 U.S. at 434-435. Committing a tender offeror to state-provided remedies also "might well prove insuperable to effective relief." Thus, only where state statutes exist *and* do not interject hurdles to effective relief should the courts hesitate in implying a private cause of action. *Cort* v. *Ash*, *supra*, 422 U.S. at 66 (1974).[318] In the area of tender offers for publicly-held corporations whose securities are traded in national markets—an area not "basically the concern of" the states (*Cort* v. *Ash*, *supra*, 422 U.S. at 78)—relegating tender offerors to whatever remedies are created by state law would neither be an adequate nor effective means of effectuating the Congressional intent in enacting the Williams Act.

---

[318] We have already indicated the inadequacy of nonstatutory state law. See pp. 44-47, *supra*.

Currently, 21 states have statutes regulating tender offers in some respects and, with a single exception,[319] each has been enacted within the past two and a half years.[320] None existed substantially prior to the Williams Act, and most reflect state efforts to counteract the regulatory even-handedness the Williams Act sought to achieve.

Motivated by a desire to protect the management of companies with significant assets or employees in, or contacts with, their states,[321]—but with operations and shareholders in several states—many of these legislative enactments frustrate Congress's clear expression of national policy to allow the forces in contention to have full play and not to "tip the balance" of regulation in favor of management or insurgents.[322] Indeed, state tender offer laws are generally designated to provide a "closed shop" for entrenched management and to neutralize the Congressional

---

[319] Virginia's statute was passed almost contemporaneously with the Williams Act. Va. Code Ann. § 13.1-528; eff. March 5, 1968 (3 CCH Blue Sky L. Rep. ¶ 49,228).

[320] New York approved tender offer legislation on July 27, 1976, effective Nov. 1, 1976, N.Y. Bus. Corp. Law § 1600 (2 CCH Blue Sky L. Rep. ¶ 35,351). Bills have been proposed in Louisiana, and Illinois has proposed administrative rules to govern tender offers. Five other states—Iowa, Florida, Missouri, Mississippi and New Jersey—have considered, but not passed, tender offer legislation.

[321] See, *e.g.*, Senate Hearings, p. 59, and Vorys, *Ohio Tender Offer Bill*, 43 Ohio Bar J. 65 (1970).

[322] See discussion at pp. 69-74, *supra*.

policy of even-handedness.[323] Thus, protective state legislation, with its "crazy quilt" pattern of conflicting and inconsistent provisions relating to jurisdiction,[324] procedure,[325] and remedies,[326] seeks to nullify

---

[323] *Id.*

[324] A critical infirmity of the emerging pattern of state regulation of tender offers is the conflicting, and often overlapping, jurisdictional provisions of the various statutes. While jurisdiction for most state provisions is predicated upon the presence in the state of the offeree or the target company, see *e.g.* Tenn. Code Ann. § 48-2102(9), eff. March 17, 1976 (3 CCH Blue Sky L. Rep. ¶ 45,192), jurisdictional bases vary widely. Some states rely on the fact that the company is incorporated in the state, Del. Code Ann. Title 8, § 203(c)(2), eff. May 1, 1976 (1 CCH Blue Sky L. Rep. ¶ 11,131); Nev. Rev. Stat. § 78.3765 (1973), or is incorporated *and* doing business in the state, Hawaii Rev. Stat. § 417E-1(5), eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,731); Va. Code Ann. § 13.1-529(e), eff. March 5, 1968 (3 CCH Blue Sky L. Rep. ¶ 49,229). Others are less stringent in asserting sufficient jurisdictional contacts requiring only that the target company be incorporated in the state *or* have its principal place of business *and* substantial assets in the state, Alaska Stat. § 45.57.110(4), eff. June 8, 1976 (1 CCH Blue Sky L. Rep. ¶ 6029); Kan. Stat. Ann. § 17-1276(a), eff. June 1974 (1A CCH Blue Sky L. Rep. ¶ 19,351); Ohio Rev. Code Ann. § 1707.041(A)(1) (Page Supp. 1974); Pa. Stat. Ann., eff. March 3, 1976 (2 Blue Sky L. Rep. 41,183); Ky. Rev. Stat. Ann., eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 20,131). At least one state simply requires that there be either incorporation in the state, *or* that the principal place of business *or* a substantial portion of its assets be located there, see Md. Ann. Code Art. 9, § 11-901(i), eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 23,421).

[325] Given the present status of state laws regulating tender offers, especially the intended imbalances of most favoring the target company and its management, procedural protec-

tions for the tender offeror are virtually non-existent. Since delays in completing a tender offer usually favor management of the target company, the cooling-off period specified in many state statutes can effectively delay the commencement of an offer for sufficient time to render it effectively inoperative, see, *e.g.*, Hawaii Rev. Stat. 417E-3(f), eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,733); Ind. Code § 23-2-3-2(e), (f), eff. May 1975 (1A CCH Blue Sky L. Rep. ¶ 17,152); Ohio Rev. Code Ann. § 1707.041(B)(1)(b).4 (2 Blue Sky L. Rep. ¶ 38,104-1), when coupled with disparate disclosure requirements, see, *e.g.* Alaska Stat. § 45.57.030, eff. June 8, 1976 (1 CCH Blue Sky L. Rep. ¶ 6029B); Colo. Rev. Stat. Ann. § 11-51.5-105, eff. July 1, 1975 (1 CCH Blue Sky L. Rep. ¶ 9155); Hawaii Rev. Stat. § 417E-7, eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,737); Ind. Code § 23-2-3-3, eff. May 1975 (1A CCH Blue Sky L. Rep. ¶ 17,153); Idaho Code § 30-1504(1), eff. July 1, 1975 (1A CCH Blue Sky L. Rep. ¶ 15,174); Md. Ann. Code Art. 9 § 11-903, eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 23,423); Mass. Gen. Laws Ann. Ch. 110C § 5, eff. May 22, 1976 (1A CCH Blue Sky L. Rep. ¶ 24,265); Minn. Stat. § 80B.04, eff. 1973 (1A CCH Blue Sky L. Rep. ¶ 26,214); Pa. Stat. Ann., eff. March 3, 1976 (2 CCH Blue Sky L. Rep. ¶ 41,186); S.D. Comp. Laws Ann. § 47-32-31, eff. 1975 (2 CCH Blue Sky L. Rep. ¶ 44,301); Tenn. Code Ann. § 48-2105, eff. March 17, 1976 (3 CCH Blue Sky L. Rep. ¶ 45,195); Utah Code Ann., eff. Feb. 5, 1976 (3 CCH Blue Sky L. Rep. ¶ 47,335); Va. Code Ann. § 13.1-532, eff. March 5, 1968 (3 CCH Blue Sky L. Rep. ¶ 49,232); Wis. Stat. § 552.07, eff. 1972 (3 CCH Blue Sky L. Rep. ¶ 52,267), and the provision in some states that a state agency must hold a hearing if requested by the target company or ten percent of its shareholders, see, *e.g.*, Mass. Gen. Laws Ann. Ch. 110c92 eff. May 22, 1976 (1A CCH Blue Sky L. Rep. ¶ 24,262); Ind. Code § 23-2-3-2(e), eff. May, 1975 (1A CCH Blue Sky L. Rep. ¶ 17,152); Minn. Stat. § 80B.03(4), eff. 1973 (1A CCH Blue Sky L. Rep. ¶ 26,213); Conn. Gen. Stat. Rev., eff. June 2, 1976 (1 CCH Blue Sky L. Rep. ¶ 10,155; S.D. Comp. Laws Ann. § 47-32-23, eff. 1975 (2 CCH Blue Sky L. Rep. ¶ 44,293). Moreover, ten states confer discretionary authority on a state agency to delay an offer summarily if

the "intrusion of federal law into the internal affairs of corporations" in an area in which Congress

they believe full disclosure is lacking, and Hawaii even allows summary delay if the offer, in the opinion of the state agency, is not fair and equitable to offerees, Hawaii Rev. Stat. § 417E-4, eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,734.

[326] Although some state statutes do proscribe conduct either fraudulent or in violation of their tender offer statutes, see, *e.g.*, Md. Ann. Code Art. 9 § 11-904, eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 23,424); Mich. Comp. Laws § 17, eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 25,357); Ind. Code § 23-2-3-9(b), eff. May, 1975 (1A CCH Blue Sky L. Rep. ¶ 17,159), they are not consistent in the remedies or penalties provided. Indeed, thirteen of the twenty-one states specify civil remedies and/or penalties for violation by tender offerors, but, consistent with the protectionist tinge to the legislation, make no specific provision for remedies in the event of violations by the target company. See, *e.g.*, Colo. Rev. Stat. Ann. § 11.51.5-106, eff. July 1, 1975 (1 CCH Blue Sky L. Rep. ¶ 9156); Hawaii Rev. Stat. § 417E-9, eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,739); Kan. Stat. Ann. § 17-1276, eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 19,351); Ky. Rev. Stat. Ann., eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 20,136); Mass. Gen. Laws Ann. Ch. 110 C § 9, eff. May 22, 1976 (1A CCH Blue Sky L. Rep. ¶ 24,269); Minn. Stat. § 80B.11, eff. 1973 (1A CCH Blue Sky L. Rep. ¶ 26,221); Ohio Rev. Code Ann. § 1707.041(E) (Page Supp. 1974); Pa. Stat. Ann., eff. March 3, 1976 (2 CCH Blue Sky L. Rep. ¶ 41,193); Tenn. Code Ann. § 48-2112, eff. March 17, 1976 (3 CCH Blue Sky L. Rep. ¶ 45,202); Utah Code Ann. eff. Feb. 5, 1976 (3 CCH Blue Sky L. Rep. ¶ 47,343); Va. Code Ann. § 13.1-539, eff. March 5, 1968 (3 CCH Blue Sky L. Rep. ¶ 49,239); Nev. Rev. Stat. § 78.3774 (1973); Wis. Stat. § 552.21, eff. 1972 (3 CCH Blue Sky L. Rep. ¶ 52,281). Thus, conflicts inconsistencies and procedural and substantive hurdles can effectively tie up an insurgent tender offeror long enough to make the success of its offer highly unlikely, and deny the offeror any effective relief should it attempt to pursue whatever remedies may exist under state law.

has clearly intended to so intrude.[327] Due to the irreconcilably conflicting policies underlying the state and federal legislation, the Congressional purpose and policy embodied in the Williams Act would be hopelessly frustrated if the parties to tender offer contests were relegated to search for remedies in the state courts.[328]

III. ANY LIMITATIONS THE COURTS IMPOSE ON THE MAINTENANCE OF, OR ON THE RELIEF GRANTED UNDER, AN IMPLIED PRIVATE RIGHT OF ACTION, SHOULD EFFECTUATE IMPORTANT PUBLIC POLICY CONSIDERATIONS, AS GLEANED BOTH FROM THE CONGRESSIONAL INTENT UNDERLYING THE STATUTORY BASIS FOR THE IMPLIED PRIVATE ACTION AND FROM THE JUDICIALLY-ENUNCIATED PURPOSES THE IMPLIED REMEDY IS TO SERVE.

Although private actions have been judicially implied under the federal securities laws for thirty

[327] See discussion, *supra*, at pp. 52-69, 83-86.

[328] The question of the constitutionality of state tender offer statutes—as constituting an excessive burden upon interstate commerce—may well be decided in the future, adding uncertainty to the inconsistency and inadequacy of state statutory remedies. See *Thrall Car Mfg. Co.* v. *Rhodes, et al.*, C-2-76-605 (S.D. Ohio); see also, Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687 (1975); Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133 (1974). Moreover, state tender offer legislation might be pre-empted by the federal statutory scheme. See, *e.g.*, Senate Committee on Banking, Housing and Urban Affairs, *Hearings on Corporate Takeovers*, 94th Cong., 2d Sess. 90, 94 (1976); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *New York Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117 (1973). We do not address these questions here, however, since they are not directly at issue in this case.

years,[329] extensive use of implied private actions by plaintiffs seeking civil remedies is of fairly recent vintage.[330] The increased reliance on implied actions under the federal securities laws has necessitated this Court's consideration of the broad parameters of such actions, a consideration which has led this Court to conclude that, just as the federal courts may imply federal remedies under the federal securities laws, so too may they imply limitations on those remedies.[331]

In short, the strong public policy considerations supporting the implication of private actions under the federal securities laws should be balanced only against competing policy considerations of equal strength, where they may exist. If private remedies are utilized or expanded in a manner inconsistent with the legislative scheme, that could encourage vexatious, ill-founded or otherwise inappropriate lawsuits —lawsuits which a reading of the express language of the federal securities laws or their legislative history would show to be at odds with the Congressional purpose. It is these lawsuits which should not be allowed to increase the burden of the courts or result in detriment to the interests of corporate shareholders

[329] *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa., 1946). See also, *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

[330] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453 (1969).

[331] *Blue Chip Stamps* v. *Manor Drug Stores, supra*, 421 U.S. at 723.

who, along with the consumers of corporate products and services, must ultimately bear the cost of such actions.[332]

In seeking to delimit the scope of implied private actions, however, caution must be exercised to avoid precluding meaningful remedies; for, it is axiomatic that the absence of a meaningful remedy in an implied private cause of action will preclude the utilization of such an action for its intended purposes and make the availability of an implied private remedy meaningless. This Court recognized as much in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970), when it awarded interim attorneys' fees to the plaintiffs, whether or not the corporation on whose behalf they sued could ever realize any monetary advantage from the suit, because such plaintiffs who fundamentally

> "vindicat[e] the statutory policy[,] * * * have rendered a substantial service to the corporation

[332] *Blue Chip Stamps* v. *Manor Drug Stores, supra*, 421 U.S. at 739, citing *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (C.A. 2, 1968) (Friendly, J., concurring), *certiorari denied, sub nom., Coates* v. *Securities and Exchange Commission*, 394 U.S. 976 (1969).

Blue Chip Stamps, supra, however, does not require courts to be unduly preoccupied with the possibility of vexatious suits. As this Court held a decade ago, private suits have "played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interests in order to enrich themselves." *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966). This Court there suggested that, in most cases, there might be a need to demonstrate that the plaintiffs "sought to do the corporation * * * injury in [the] litigation," before it would affix the appellation "vexatious" to such suits.

> and its shareholders * * * 'involv[ing] corporate therapeutics'[,] and furnish a benefit to all shareholders by providing an important means of enforcement of the * * * statute."

Accord, Surowitz v. *Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966).

While the limits of implied private actions are an appropriate concern of the courts, at least until Congress should act, the existence of implied remedies has repeatedly been affirmed, even in cases in which it has been deemed appropriate to impose limitations on such suits.[333] Accordingly, the imposition of any limitations on implied private actions should flow from important countervailing considerations, and be imposed only to the extent consistent with Congressional intent. This translates into a series of operative policy objectives which the Commission believes effectuates the basic purpose served by implying judicial remedies under the federal securities laws, while at the same time delimiting the scope of such remedies to avoid unfortunate and unintended consequences.

Thus, in applying delimiting doctrines, this Court has instructed that the starting point is always Congressional intent. Any limitation on an implied ac-

---

[333] As this Court noted in *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 62 (1975): "Of course, we have not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission."

tion under the federal securities laws should be "consistent with the legislative scheme" [334] and not impede or frustrate the purposes which the statutory provision and implied remedy seek to effectuate.[335] And, this is particularly so when private enforcement is a "necessary supplement" to Commission action.[336] But, just as the Court has declined to impose limitations on implied private actions where such limitations would be inconsistent with Congressional purposes, it has limited such private actions where the failure

---

[334] *Rondeau, supra*, 422 U.S. at 62; *Cort, supra*, 422 U.S. at 78; *National Railroad Passenger Corp., supra*, 414 U.S. at 458-461; *Barbour, supra*, 421 U.S. at 423-424.

[335] In *Mills* v. *Electric Auto-Lite Co., supra*, 396 U.S. at 382, for example, the plaintiffs alleged that a proxy statement soliciting shareholder support for a merger was materially misleading because it did not divulge the fact that management, which supported the merger, was financially interested in assuring the approval of the merger. The defendants asserted that, irrespective of any material omissions in the proxy statement, the merger was fair. But, the alleged "fairness of the merger" was rejected by this Court as an adequate defense, since such a defense would have "subvert[ed] the congressional purpose of ensuring full and fair disclosure to shareholders." As this Court there explained,

> "The risk that [the plaintiffs] would be unable to rebut the corporation's evidence of the fairness of the proposal, and thus to establish their cause of action, would be bound to discourage such shareholders from the private enforcement of the proxy rules that 'provides a necessary supplement to Commission action.' "

[336] *Borak, supra*, 377 U.S. at 432; *Mills, supra*, 396 U.S. at 382; *Rondeau, supra*, 422 U.S. at 62.

to do so would unreasonably and needlessly expand expressed Congressional motives.[337]

Similarly, the express language of the provision pursuant to which a private action has been implied is a second guide in determining whether, when, and how, to limit implied actions under the federal securities laws.[338] On the other hand, this Court has refused to imply limitations where the proposed limitation was not consistent with the express language of the statute.[339]

---

[337] In *Cort* v. *Ash*, *supra*, 422 U.S. at 84, for example, this Court declined to imply a private damage action for corporate shareholders alleging violations of 18 U.S.C. § 610, which prohibits corporate contributions or expenditures in certain elections, upon determining that, unlike the present case, "the remedy sought would not aid the primary congressional goal."

[338] In *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 733, for example, this Court concluded that the requirement in Section 10(b) of the Securities Exchange Act—that a violation, to be actionable, occur "in connection with the purchase or sale of any security"—by its very terms precluded an implied private action for damages by a person who did not actually purchase or sell any securities. Similarly, in *Ernst & Ernst* v. *Hochfelder*, *supra*, 96 S.Ct. at 1385, this Court implied a scienter limitation on private damage actions under Section 10(b) of the Exchange Act only after determining that the express use of the terms "manipulative," "device," and "contrivance" in Section 10(b) was intended to proscribe knowing or intentional (and possibly reckless), as opposed to merely negligent, misconduct.

[339] In *Mills* v. *Electric Auto-Lite Co.*, *supra*, a major reason for rejecting the "fairness of the merger" as a defense (see n. 335, *supra*), was that "[s]uch a frustration of the congressional policy is not required by anything in the wording of the statute * * *." 396 U.S. at 383. See also, *J. I. Case Co.* v. *Borak*, *supra*, where this Court declined to limit the relief

And, finally, a third guideline for determining whether to limit implied private actions may be derived from the express remedy provisions of the Act. In that context, it is instructive that, in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 736, this Court concluded that "[i]t would indeed be anomalous to impute to Congress an intention to expand the * * * bounds it delineated for comparable express causes of action" for judicially-implied causes of action under other sections of the Act. In so holding, this Court was giving effect to the philosophical underpinnings Congress sought to reflect in the express remedy provisions of the Act. As such, where express remedies are indeed "comparable" to remedies judicially implied by the courts, the "bounds * * * delineated" by the Congress in creating express remedies serve as a useful yardstick against which to measure limitations on implied actions.[340] Neverthe-

---

available in an implied action under the proxy rules to prospective relief, because the express language of Section 14(a) included the protection of investors, which "certainly implies the availability of judicial relief where necessary to achieve that result." 377 U.S. at 432.

[340] In *Blue Chip Stamps*, *supra*, therefore, this Court limited standing in implied damage actions under Section 10(b) and Rule 10b-5 to actual purchasers or sellers of securities, relying, in part, on the fact that Congress, in amending Section 11 of the Securities Act in 1934, provided that the courts could require an undertaking for expenses in any action under Section 11. Citing the legislative history of this amendment, the Court pointed out that one of the purposes of the amendment was to prevent nuisance or strike suits, and stated that:

"Where Congress in those sections of the 1933 Act which

less, even though express remedies may furnish a useful reference point in delimiting implied private actions, the existence of limitations in the express remedy sections does not necessarily require the imposition of the same, or even a similar, limitation on an action implied under another section of the federal securities laws.[341]

---

expressly conferred a private cause of action for damages, adopted a provision uniformly regarded as designed to deter 'strike' or nuisance actions, * * *, that fact alone justifies our consideration of such potential in determining the limits of the class of plaintiffs who may sue in an action wholly implied from the language of the 1934 Act."

Id., at 741.

[341] See, *e.g.*, *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940), where this Court refused to deny plaintiffs, suing under Section 12(2) of the Securities Act, standing to seek an injunction, even though the statutory remedy expressly referred to in Section 12(2) did not include injunctive relief. As this Court there noted (*id.*, at 288):

> "[S]ection 12(2) states the legal consequences of conduct proscribed by the Act; it does not purport to state the form of action or procedure the claimant is to employ.
>
> "Moreover, in Section 22(a), * * * specified courts are given jurisdiction 'of all suits in equity and actions at law brought *to enforce* any liability or duty created by this subchapter.' The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit * * *" (emphasis in original).

The foregoing principles, derived largely from the teachings of this Court and sound canons of statutory construction, militate against blackletter law responses to the limitations suggested by the parties for implied private actions under the Williams Act. But, they do serve to order a discussion of the single significant limitation issue raised—the appropriate manner of measuring damages in an implied action under Section 14(e) of the Act.[342]

---

[342] Three threshold limitations suggested by the parties seem susceptible of fairly abbreviated disposition.

(1) Relying on this Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores, supra,* it has been suggested that the purchaser-seller limitation on standing to sue under Section 10(b) of the Act, and Rule 10b-5 thereunder, should also be engrafted onto private actions under Section 14(e).

The purchaser-seller limitation on Rule 10b-5 actions was imposed by this Court in *Blue Chip* largely as a result of the precise language of Section 10(b)—that violations occur in connection with "the purchase or sale of any security"—language pointedly not present in Section 14(e). Indeed, the same court that first implied the purchaser-seller limitation for 10b-5 private actions has held that the same limitation does not apply in private actions under the Williams Act, *Electronic Speciality Co.* v. *International Controls Corp.*, 409 F.2d 937, 945 n.6 (C.A. 2, 1969); A-34, and its view in that regard has been followed by every court to consider the question. See, *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 (C.A. 5, 1974), *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (C.A. 1, 1973); *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890, 914 (D. Me., 1971). See also, Bromberg, *Securities Law of Tender Offers*, 15 N.Y.L.F. 459, 548-549 (1969). Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15

N.Y.L.F. 296, 289 (1969); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1260 (1973); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700, 709-710 (1970). This is consistent with the legislative history underlying the enactment of Section 14(e). It was noted during the hearings that the broad language of the Section was intended to correct the "unsettled state of the law" with respect to the need for a purchase or sale. See House Hearings, p. 59.

Moreover, requiring private plaintiffs to demonstrate that they purchased or sold a security, before they could complain of violations in connection with a tender offer, would deny them many essential protections of the Williams Act—for example, if an offeror received more shares than it requested, but refused to apply the pro-rata acceptance protections of Section 14(d)(6) of the Act to a tendering shareholder; in such a circumstance, the very act complained of would be that the plaintiff could not "sell" or tender securities when it had a statutory right to do so. Like the proxy rules, upon which it was patterned, the Williams Act was meant to govern the *conduct* of contests for corporate control, not simply fraud in the purchase or sale of securities.

(2) It is also suggested that this Court should limit the application of the protections of Section 14(e) of the Williams Act only to cash tender offers, not exchange offers. But, Section 14(e) of the Act, by its express terms applies to "*any* tender offer * * *," and it makes no distinction between cash tender offers and tenders through an exchange of securities. Moreover, the Committee reports on the Williams Act explicitly state that Section 14(e) applies to "any tender offer, whether for cash, securities or other consideration." H.R. Rep. 1711, 90th Cong., 2d Sess. 11 (1968); S. Rep. 550, 90th Cong., 1st Sess. 10-11 (1967). Indeed, before its enactment, the terms of Section 14(e) were moved to a separate subparagraph precisely to ensure that it would apply to

exchange offers as well as cash offers. See p. 63 n. 156, *supra*.

It is possible that persons misled in an exchange tender offer may also fall within the class of persons expressly protected by Sections 11 or 12(2) of the Securities Act, but that fact, if true, would not warrant judicial rewriting of the terms of Section 14(e). Persons who actually tender their shares and have a cause of action under Section 11 of the Securities Act presumably should not also need the protections of Section 14(e); and, in such circumstances, actions brought under Section 14(e) presumably would, in most cases, be subject, by analogy, to the same conditions provided in Section 11. See pp. 149-160, *infra*. *Cf. Ernst & Ernst* v. *Hochfelder*, 96 S.Ct. 1375.

(3) Finally, some of the parties suggest that a prevailing plaintiff in a suit involving violations of the Williams Act should be limited to prospective, injunctive, relief only, and that damage relief should not be available.

But that issue was definitively resolved in *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432-435 (1964), where this Court rejected an identical claim, in part because "the possibility of civil damages" was "a most effective weapon in the enforcement of the proxy requirements," and in part because it is "the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." *Accord, Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), *Bath Indus. Inc.* v. *Blot*, 427 F.2d 97, 113 (C.A. 7, 1970); *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 423 (C.A. 1, 1973); *cf. Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 59 (1975).

Indeed, limiting private parties to prospective injunctive relief may, effectively, limit them to largely illusory remedies. A takeover may occur with great speed so that a court would generally be asked to grant an injunction before all the facts are known. Because a tender offer may be based on financial commitments of a limited duration, a court might well hesitate to enjoin the offer until

The Commission, as a government agency, properly has no interest in the specific *amount* of damages awarded for a proven violation of the Act; its concern is with the *principles* applied in arriving at a computation of damages. To effectuate the purposes of the Act, the manner in which damages are calculated

---

complex and difficult questions of fact and law have been resolved. In addition, "once the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to 'unscramble the eggs.'" *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 250 (C.A. 2, 1973). Since there is nothing in the statutory policy of the Act which "requires the court to unscramble a corporate transaction merely because a violation occurred," *Mills* v. *Electric Auto-Lite Co., supra*, 396 U.S. at 386, a court, in devising the type of restrospective relief which is most appropriate, should "consider the same factors that would govern the relief granted for any similar illegality or fraud." *Id.* at 386. "[M]onetary relief" should always be "a possibility," *Mills, supra*, 396 U.S. at 388. The lower courts have been uniform in awarding damages, where appropriate, in private actions under Section 14(e). See, *e.g., Lowenschuss* v. *Kane*, 520 F.2d 255, 268-269 (C.A. 2, 1975); *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424-425 (C.A. 1, 1973).

Hawaii v. *Standard Oil Co. of Cal.*, 405 U.S. 251 (1972), does not compel a different result. In *Hawaii*, this Court simply held that Section 4 of the Clayton Act, 15 U.S.C. § 15, required a litigant to demonstrate actual injury to its "business or property" before damages could be awarded. The State of Hawaii was permitted to maintain such an action to the extent it could demonstrate such losses in its proprietary capacity, but was not permitted to maintain such a suit, as *parens patriae* for its citizenry, because of an alleged, and rather amorphous injury to its "general economy," 405 U.S. at 264.

should both implement the statutory scheme, and not cause undue disruption in the methods by which persons regulated under the Act carry on their normal business activities.

If damages are denied in the face of truly violative conduct, or, are otherwise inadequate where real injury has been suffered, so as to diminish the likelihood that bona fide private lawsuits will be brought or, conversely, if damages are computed in a Draconian fashion, the principles employed in awarding and measuring damages will not effectuate the Congressional purposes underlying the Act.

On the other hand, awards of damages under the federal securities laws were intended to be compensatory. Section 28(a) of the Securities Exchange Act authorizes the courts to award damages in private actions under the Act to compensate for the "actual damages [sustained] on account of the act complained of," [343] including consequential damages,[344] while punitive and speculative damages have traditionally been viewed as contrary to the intent of Section 28.[345] In

---

[343] *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 154-155 (1972); *Simon* v. *New Haven Bd. & Carton Co., Inc.*, 516 F.2d 303 (C.A. 2, 1975); *Wolf* v. *Frank*, 477 F.2d 467 (C.A. 5), *certiorari denied*, 414 U.S. 1065 (1973); *Richardson* v. *MacArthur*, 451 F.2d 35 (C.A. 10, 1971).

[344] *Affilated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972); *Janigan* v. *Taylor*, 344 F.2d 781, 786 (C.A. 1), *certiorari denied*, 382 U.S. 879 (1965).

[345] *deHaas* v. *Empire Petroleum Co.*, 435 F.2d 1223 (C.A. 10, 1970); *Myzel* v. *Fields*, 386 F.2d 718 (C.A. 8, 1967), *certiorari denied*, 390 U.S. 951 (1968); *Green* v. *Wolf Corp.*,

measuring damages sustained by a prevailing plaintiff under the Act, the courts most frequently look to the plaintiff's "out-of-pocket" expenses.[346] Similarly, under the Securities Act, punitive damages have been disallowed,[347] and the damages based on limitations provided by Section 11 and 12 of that Act have been, in acordance with their terms, computed to

406 F.2d 291 (C.A. 2, 1968), *certiorari denied*, 395 U.S. 977 (1969); *Simon* v. *New Haven Bd & Carton Co., Inc.*, 516 F.2d 303 (C.A. 2, 1975); *Meisel* v. *North Jersey Trust Co. of Ridgewood*, 216 F. Supp. 469 (S.D. N.Y., 1963); *Schaefer* v. *First National Bank of Lincolnwood*, 326 F. Supp. 1186 (N.D. Ill., 1970), *appeal dismissed*, 465 F.2d 234 (C.A. 7, 1972); *In Re Caesars Palace Securities Litigation*, 360 F. Supp. 366 (S.D. N.Y., 1973). See *Wolf* v. *Frank*, 477 F.2d 467 (C.A. 5, 1973), *certiorari denied*, 414 U.S. 975 (1973).

On the other hand, as this Court has held, where a defendant-buyer has received more than the plaintiff-seller's actual loss, "damages are the amount of the defendant's profit." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972). *Accord, Janigan* v. *Taylor*, 344 F.2d 781, 786 (C.A. 1), *certiorari denied*, 382 U.S. 879 (1965).

[346] See e.g. *Abrahamson* v. *Fleschner*, 392 F. Supp. 740 (S.D. N.Y., 1975), *appeal pending*, Docket No. 75-7203 (C.A. 2); *Schaefer* v. *First National Bank of Lincolnwood, supra*, 326 F. Supp. 1186; *Tucker* v. *Arthur Andersen & Co.*, 67 F.R.D. 468 (S.D. N.Y., 1975).

[347] See, *e.g., Hill York Corp.* v. *American International Franchises, Inc.*, 448 F.2d 680, 697 (C.A. 5, 1971); *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1284-1287 (C.A. 2, 1969), *certiorari denied*, 397 U.S. 913 (1970); *Green* v. *Wolf Corp., supra*, 406 F.2d at 303; Hirsch & Lewis, *Punitive Damages Under the Federal Securities Acts*, 47 Notre Dame L. Rev. 72 (1971). But see, *Nagel* v. *Prescott & Co.*, 36 F.R.D. 445, 449 (N.D. Ohio, 1964) suggesting that exemplary damages are not excluded under Section 12(2), "upon a proper showing of maliciously improper conduct;" *Berley* v. *Dreyfus & Co.*, 43 F.R.D. 397, 399 (S.D. N.Y., 1967) (*semble*).

compensate successful plaintiffs for the actual damages they have sustained.[348]

A careful balancing of the several factors which play a role in the resolution of these competing policy considerations is required to harmonize the prior teachings of this Court with the need to fashion appropriate relief to remedy violations of the Williams Act.

In considering the measure of damages in implied private actions, this Court has repeatedly made clear the fact that questions of relief and liability should be treated separately under the Securities Exchange Act, and that a separate standard of causation should be applied to each. Thus, in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 384-385, it was held that causation, for the purpose of liability, may be established as a matter of law once the materiality of a misleading statement or omission had been established. Mr. Justice Harlan, writing for a unanimous Court on this point, stated:

> "Where the misstatement or omission in a proxy statement has been shown to be material, * * * that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This re-

[348] 15 U.S.C. 78k and 78*l*; See, *e.g., Kramer* v. *Scientific Control Corp.*, 365 F. Supp. 780 (E.D. Pa., 1973); *Goldman* v. *Bank of Commonwealth*, 332 F. Supp. 699 (E.D. Mich., 1971), *affirmed*, 467 F.2d 439 (C.A. 6, 1972); *Hirsch & Lewis, supra.*

quirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by § 14 (a).

There is no need to supplement this requirement with a requirement of proof of whether the defect actually had a decisive effect on the voting. *Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself * * * was an essential link in the accomplishment of the transaction.*" [349]

Similarly, in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 154 (1972), this Court unanimously held that the "withholding of a material fact establish[es] the requisite element of causation in fact" to make out a cause of action under Rule 10b-5; and, in *TSC Indus., Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126, 2130 (1976), it was held that "[s]o long as the misstatement or omission was material, the causal

[349] (Emphasis supplied.) In *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964), this Court held that a private right of action "exists as to both derivative and direct" claims, even before a "causal relationship" had been established between the violation alleged and the injury claimed.

relation between violation and injury is sufficiently established'." [350]

However, *Mills* was careful to separate the two very different contexts in which "causation" arises: (i) causation for purposes of determining the existence of a cause of action—that is, liability, and (ii) damages causation. As to the latter, the Court made clear:

> "Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation implies nothing about the form of relief to which they may be entitled."

396 U.S. at 386.

[350] And see, *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975). Just as causation may be established by the materiality of the misstatements or omissions in proxy or tender offer materials, so too may reliance. In *Ute, supra*, this court held that "positive proof of reliance [on material misrepresentations] is not a prerequisite to recovery. All that is necessary is that the facts withheld be material * * *." 406 U.S. at 153-154. See also *Mills, supra*, 396 U.S. at 382 n. 5; *TSC, supra*, 96 S. Ct. at 2132 n. 9, to the effect that "positive proof of reliance is not necessary when materiality is established."

The practical necessity of deducing reliance from materiality rather than requiring actual proof of reliance was explained by Mr. Justice Harlan in *Mills*:

> "Proof of actual reliance by thousands of individuals would, as the [lower] court acknowledged, not be feasible, * * * and reliance on the *nondisclosure* of a fact is a particularly difficult matter to define or prove * * * (citations omitted, emphasis in original).

396 U.S. at 382 n. 5.

After considering "[p]ossible forms of relief," 396 U.S. at 386, the Court concluded that "damages should be recoverable only to the extent that they can be shown," 396 U.S. at 389, and remanded the case for further proceedings on the damages question. Indeed, "*Mills* could not be plainer in holding that the questions of liability and relief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles," *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 64 (1975).

Application of the *Mills-Ute-TSC* objective standard of liability causation to Section 14(e) follows logically from the intent of the Congress to establish under the tender offer provisions a scheme of regulation parallel to that existing under the proxy provisions.[351] As Mr. Justice Harlan noted in *Mills*, the objective test "avoid[s] the impracticalities," of proving injury and, "by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 385. This rationale is equally applicable to actions brought for violations of Section 14(e), since that Section was designed to protect each of the parties participating in, or affected by, tender offer contests.[352] Causation, therefore, should be presumed, as was done by

[351] See, pp. 52-54, *supra*.

[352] See discussion at pp. 69-74, *supra*.

the Court of Appeals below[353] for the purposes of establishing liability under Section 14(e) where material misstatements or omissions have been shown.

But, as was held in *Mills*, *supra*, 396 U.S. at 389, and noted in *Rondeau*, *supra*, 422 U.S. at 64, "damages should be recoverable only to the extent that they can be shown." The presumption of causation from materiality, consequently, does not automatically entitle a private plaintiff to monetary damages—a causal connection between the material misstatement or omission on the one hand, and the consequences complained of on the other, must be demonstrated. Thus, while the court below, having properly found material misstatements and omissions,[354] properly presumed causation to establish liability[355] (A. 55-63), the

[353] See A. 55-63.

[354] See *TSC Indus., Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126, 2130-2131 (1976).

[355] The Court of Appeals below held:

> "[T]he fact that CCI was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential. It would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require CCI to prove that each individual Piper shareholder who failed to trade for CCI's stock, or who traded for BPC's stock, relied upon defendants' misrepresentations in doing so. These impracticalities are avoided by establishing a presumption of reliance where it is logical to presume that reliance in fact existed. *Kohn* v. *American Metal Climax, Inc.*, *supra*, 458 F.2d at 288-

plaintiff here should be allowed to recover only those damages shown to have been caused by the violative conduct. For, as Judge Friendly stated in *Crane Co.* v. *American Standard, Inc.*, 490 F. 2d 332, 334 (C.A. 2, 1973):

> "Quite conceivably a judge * * * might find the chain of causation so dubious and the task of determining damages so elusive as to lead him to decide that, except for some items that may be readily provable, he could not properly award anything save perhaps attorneys' fees."

Beyond the question of causation, federal courts, in exercising their power to "make effective the right of recovery afforded by the Act," [356] cannot ignore the fact that the Williams Act, as part of the Securities Exchange Act, subjects injured plaintiffs to the limitations on recovery the Act generally provides in Section 28(a)—"actual damages on account of the Act complained of." [357]

---

291. As we have stated above, § 14(e) was designed to protect offerors from unfair and unlawful opposition. By 'resolving doubts in favor or those the statute is designed to protect,' *Mills* v. *Electric Auto-Lite Co., supra*, 396 U.S. at 385, we are implementing congressional intent not only to protect investors, but to make sure that contests for control between offerors and incumbent management, or other offerors, shall proceed fairly." (A. 59-60).

[356] *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940). *Accord, J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433-434 (1964).

[357] 15 U.S.C. 78bb. That damages may be awarded for Williams Act violations has not been doubted by the lower courts. See, *e.g., Lowenschuss* v. *Kane*, 520 F.2d 255, 268-269 (C.A. 2, 1975); *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424-425 (C.A. 1, 1973).

Sections 14(e) and 28(a), moreover, are but two provisions of the Securities Exchange Act which, along with the Securities Act, "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst* v. *Hochfelder, supra*, 96 S. Ct. at 1387; *Blue Chip Stamps, supra*, 421 U.S. at 727-730. Accordingly, as this Court has noted, "the interdependence of the various sections of the federal securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen * * *." *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 466 (1969); *Hochfelder, supra*, 96 S. Ct. at 1388-1389. In accordance with this teaching and because the instant case involves misleading statements in a registration statement and prospectus filed in connection with an exchange tender offer,[358] the express civil liability sections of the Securities Act should be considered in determining the appropriate relief to be granted here.[359]

---

[358] See A. 15-18.

[359] As a threshold proposition, it seems self-evident that the courts may, on an *ad hoc* basis, limit the relief available in a private action under the Williams Act where the Commission has obtained relief in its own enforcement action which restores all injured persons to their status quo ante, or otherwise makes them whole. While the Commission may not institute its own lawsuit to vindicate purely individual grievances, see, *e.g., Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929), when the Commission does bring suit, it may

seek remedies that are ancillary to its traditional injunctive relief, including the disgorgement of profits unlawfully obtained by wrongdoers and the creation of a pool of funds to compensate the victims of a fraud. See, *e.g., Securities and Exchange Commission* v. *Manor Nursing Centers, Inc.* 458 F.2d 1082 (C.A. 2, 1972); *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (C.A. 2, 1971); *Securities and Exchange Commission* v. *Bowler*, 427 F.2d 190, 197-198 (C.A. 4, 1970); *Securities and Exchange Commission* v. *Bartlett*, 422 F.2d 475, 477-478 (C.A. 8, 1970); *Los Angeles Trust Deed & Mortgage Exchange* v. *Securities and Exchange Commission*, 285 F.2d 162, 181-182 (C.A. 9, 1960); *Securities and Exchange Commission* v. *Aldred Investment Trust*, 151 F.2d 254 (C.A. 1, 1945). Such relief is sought by the Commission to effectuate the purposes of the federal securities laws, and is a proper exercise of the equity powers of a federal court. *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co., supra*, 446 F.2d at 1308.

And, where the Commission obtains injunctive and other equitable relief, such a result conceivably could, as well, redress in whole or in part injuries suffered by private litigants. Since private actions are implied under the federal securities law, at least in part, to "supplement" Commission enforcement action, the effects of the award of such remedies in Commission actions should be considered before a damage award is made in a private action.

In the instant case, for example, the Commission obtained a judgment requiring Bangor Punta to make a rescission offer to all of the Piper shareholders who had tendered their shares during the period in which the misleading Bangor Punta prospectus was in circulation (D-16). Thus, the District Court attempted to remedy the misleading registration statement and prospectus by restoring the Piper shareholders to the status quo ante violation. Had no other violations occurred, and, if Chris-Craft were unable to sustain a showing that it had suffered damages, no further award of relief would be necessary. The Commission, however, in seeking disgorgement of illegal profits, cannot always effect an award of monies in an amount equal to the actual damages suffered by the parties to a transaction, and, therefore, it is likely that there will be many situations where private damage actions will be necessary

Sections 11, 12 and 15 create express civil liabilities under the Securities Act.[360] Each of these sections "allow[s] recovery for negligent conduct," *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. at 1388. Section 11, for example, claimed by First Boston here as a limitation on its liability, "unambiguously creates a private action for damages when a registration statement includes untrue statements of material facts or fails to state material facts necessary to make the statements therein not misleading," *Hochfelder, supra*, 96 S. Ct. at 1388. Similarly, Section 12 "creates potential civil liability for a seller of securities in favor of the purchaser for misleading statements or omissions in connection with the transaction," *id.*, at 1338 n. 27. Unlike Section 28(a) of the Securities Exchange Act, however, Sections 11 and 12(2) specify precise damage measurements to be applied.

Since both Section 11 and Section 12 of the Securities Act explicitly provide for recovery where

---

to complement Commission actions, see, *e.g.*, Ruder, *Texas Gulf Sulphur—The Second Round*, 63 N.W. L. Rev. 423, 429 (1968).

[360] Section 11 of the Securities Act establishes express civil remedies for false or misleading registration statements. Section 12 of the Act establishes express civil remedies for false or misleading prospectuses or oral communications. Section 15, relating to "control" persons, is not relevant for the purposes of this discussion, although the reasoning herein should be equally applicable in a Section 15 action, 96 S. Ct. at 1388 n. 27.

conduct is merely inadvertent or negligent,[361] and since violations of these sections may also amount to violations of the Securities Exchange Act,[362] the question arises whether recovery for wrongs that are violations of both acts are necessarily limited by the express civil remedy provisions of the Securities Act. Limitations on recovery in these express civil remedy provisions provide an apt analogy for measuring damages resulting from negligent or inadvertent violations of the Securities Exchange Act. Where there is added the ingredient of fraud, however, the limitations on recoveries under the Securities Act should not be applied by analogy to suits for violations under the Securities Exchange Act, even if the suit could also have been maintained under the Securities Act.

Judge Jerome Frank first decided this issue twenty-five years ago, in *Fischman* v. *Raytheon Manufacturing Co.*, 188 F. 2d 783, 786-787 (C.A. 2, 1951). Writing for a unanimous panel of the Court

---

[361] *Ernst & Ernst* v. *Hochfelder, supra,* 96 S. Ct. at 1388; *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (C.A. 2, 1951); *Unicorn Field, Inc.* v. *Cannon Group, Inc.*, 60 F.R.D. 217 (S.D. N.Y., 1973); *Phillips* v. *Alabama Credit Corp.*, 403 F.2d 693 (C.A. 5, 1968); *Johns Hopkins University* v. *Hutton*, 297 F. Supp. 1165 (D. Md., 1968), *affirmed in part, reversed in part*, 422 F.2d 1124 (C.A. 4, 1970); *Wilko* v. *Swann*, 127 F. Supp. 55 (S.D. N.Y., 1955).

[362] See, *e.g.*, *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (C.A. 2, 1951); *Matheson* v. *Armbrust*, 284 F.2d 670 (C.A. 9, 1960); *Ellis* v. *Carter*, 291 F.2d 270 (C.A. 9, 1961); *Orn* v. *Eastman Dillon, Union Securities & Co.*, 364 F. Supp. 352 (C.D. Cal., 1973).

of Appeals for the Second Circuit, Judge Frank held that suits under Section 10(b) of the Securities Exchange Act could be brought "free of the restrictions" applicable to a suit under Section 11 of the Securities Act:

> "We think that when, to conduct actionable under § 11 of the 1933 Act, there is added the ingredient of fraud, then that conduct becomes actionable under § 10(b) of the 1934 Act and [Rule 10b-5] at the suit of any defrauded person, whether or not he could maintain a suit under § 11 of the 1933 Act.
>
> "Were this not true, Section 11 of the 1933 Act, designed to protect investors even where there is no fraud, would afford a shelter or sanctuary for those who defraud investors" (footnote omitted).

Cf. McClure v. *Borne Chemical Co.*, 292 F. 2d 824 (C.A. 3, 1961); *Donlon Indus. Inc.* v. *Forte*, 402 F. 2d 935 (C.A. 2, 1968) (Friendly, J.); *Ellis* v. *Carter*, 291 F. 2d 270 (1961); *Matheson* v. *Armbrust*, 284 F. 2d 670 (1960). Knowing wrongdoers, in sum, should not be able to find "shelter or sanctuary" in the express limitations on liability set forth in the Securities Act to protect against inadvertent misleading statements.[363] Thus, if First Boston,

---

[363] *Cf. Herzfeld* v. *Laventhal, Kreckstein, Horwath & Horwath*, CCH Fed. Sec. L. Rep. ¶ 95,660 (C.A. 2, July 15, 1976); *Bailey* v. *Meister Brau, Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,543 (C.A. 7, May 6, 1976); *Gould* v. *American-Hawaiian Steamship Company*, CCH Fed. Sec. L. Rep. ¶ 95,512 (C.A. 3, April 8, 1976); and *United States* v. *Charnay*, CCH Fed. Sec. L. Rep. ¶ 95,560 (C.A. 9, May 7, 1976), *petition for rehearing en banc denied* (C.A. 9, July 8, 1976).

[Footnote continued on page 154]

Bangor Punta or the Pipers made knowing misstatements in connection with sales of securities, the limitations on recovery under the Securities Act should not, by analogy, be applied to limit the relief that Chris-Craft can obtain from them under Section 14(e).[364]

---

[363] [Continued]

If liability for violations of the Securities Exchange Act were limited to the same amounts recoverable under the Securities Act when both Acts are violated, it would be possible for the perpetrators of a fraud to calculate, in accordance with the precise damage provisions of Sections 11 and 12 of the latter Act, the maximum amount of their liability and thus the maximum risk to which their knowing fraud, if uncovered, would expose them. But such a result is contrary to the entire purpose of the Securities Act. Moreover, it is apparent that "actual damages" to the victim of such a knowing fraud might far exceed the amount recoverable under the Securities Act, a burden that the wrongdoer, not his victim, appropriately should bear.

[364] As the above analysis suggests, "scienter," *i.e.*, "a mental state embracing intent to deceive, manipulate or defraud," *Ernst & Ernst* v. *Hochfelder*, 96 Sup. Ct. 1375, 1381 n. 12, is not a necessary element to establish entitlement to damages in a cause of action pursuant to Section 14(e). Damages may be limited by analogy to Sections 11 and 12 of the Securities Act if the conduct of the parties here was inadvertent or merely negligent. By the same token, damages may be awarded in accordance with Section 28(a) of the Securities Exchange Act against the knowing violator.

The statutory language of Section 14(e)—"the starting point in every case involving the construction of a statute," *Blue Chip Stamp* v. *Manor Drug Stores*, 421 U.S. at 756 (Powell, J., concurring)—is in itself ample indication that Congress intended to proscribe strictly inadvertent, misleading statements and omissions: The Section is drafted in the disjunctive, it directly prohibits failures to disclose and it specifically proscribes the making of "untrue" statements. This Court intimated as much in *Ernst & Ernst* v.

Conversely, however, where conduct is merely negligent or inadvertent, the Securities Act limitations on liability appropriately, by analogy, may be applied. Thus, if this Court were to find that Bangor Punta or the Pipers made false and misleading statements in connection with the sale of Bangor Punta or Piper securities, but that such statements were made inadvertently, by analogy the limitations on recovery

---

Hochfelder, supra, when it examined the language of Rule 10b-5, which is followed almost word for word in the language of Section 14(e), and concluded:

> "Viewed in isolation the language of subsection (2), and arguably that of subsection (3), could be read as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not."

96 S. Ct. at 1390.

In addition, the legislative history unmistakably indicates that Congress was concerned with "inaccurate or incomplete" information and presentations, see, *e.g.*, 112 Cong. Rec. 19003 (1966), Senate Hearings, pp. 17, 19, 20, 28, 31, 35, 38, 98-99, 125, 159, 178, 196, 210; Senate Report, 10-11; House Hearings, pp. 17, 59; and was aware that the Section as drafted would not require proof of fraud, Senate Hearings, p. 196. See also, *id.*, pp. 125, 159 and 178. Moreover, since an intent to deceive, manipulate, or defraud is not, and has not been, required to establish violations of Rule 14a-9, adopted pursuant to Section 14(a) of the Exchange Act, see, *e.g., Richland* v. *Crandall*, 262 F. Supp. 538 (S.D. N.Y., 1967); *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (C.A. 2, 1973) (Friendly, J.); *Gould* v. *American Hawaiian Steamship Company*, 523 F. 2d 761 (C.A. 3, 1976), and, since the relevant portion of Section 14(e) is substantially identical to Rule 14a-9, see Senate Hearings, pp. 140-141, such an intent should not be required to establish a violation of Section 14(e). But *cf. Gerstle* v. *Gamble-Skogmo, Inc., supra,* 478 F. 2d at 1299 n. 17.

in Section 12(2) of the Securities Act might be applied. Similarly, if this Court were to find that First Boston acted as an underwriter and nothing more, and that its conduct with regard to the misleading registration statement was merely inadvertent or negligent, it would be proper to apply, by analogy, limitations on relief similar to those in Section 11 in assessing damages against it.[365]

[365] The court of appeals found that First Boston "had an obligation with respect to the [Bangor Punta] exchange offer to reach a careful, independent judgment" (A. 51) and that First Boston was "duty bound to make a reasonable further investigation" (A. 51), if a suggestion arose that the exchange offer materials were deceptive (A. 51). Further, it explicitly held that "First Boston did not adequately perform its duty," (A. 51) and that its conduct "went far beyond mere negligence" (A. 54) and "amounted to an almost complete abdication of its responsibilities". (A. 55).

The district court, by contrast, failed to perceive the independent duty of First Boston. It found that First Boston "acted solely in furtherance of what [it] believed in good faith to be the legitimate interests of [its] clients" (A. 159). Thus, while the court of appeals analyzed First Boston's liability in terms of negligence and the breach of its duty as an underwriter, the district court conducted its analysis from the premise that First Boston was not to be "responsible or liable for the action of its clients" (A. 159) in the absence of "fraud or deceit" (A. 158).

It is the Commission's view that the premise from which the court of appeals began its inquiry was the correct one. The appellate court properly observed that:

> "An underwriter by participating in an offering constructively represents that statements made in the registration materials are complete and accurate. The investing public properly relies upon the underwriter to check the accuracy of the statements and the soundness of the offer; when the underwriter does not speak out, the investor reasonably assumes that there are no undisclosed material deficiencies" (A. 50).

Reliance on Section 11 limitations on recovery, however, is fundamentally misplaced if an investment banker serves in the dual capacity of underwriter *and* dealer-manager. The role of the dealer-

Consequently, an underwriter has a duty to act diligently in performing its function and to inquire when it is "aware of facts that strongly [suggest], even though they [do] not conclusively show, that * * * registration materials [are] deceptive" (A. 51). Because First Boston did not conduct such an inquiry here, although it had reason to believe that Bangor Punta's registration statement might be deceptive, First Boston breached its duty as an underwriter and consequently may properly be found, on the present record, at least liable in accordance with the minimal liability provisions of Section 11. Thus, the judgment of the court of appeals as against First Boston should be affirmed insofar as it compensates Chris-Craft in accordance, by analogy, with Section 11 of the Securities Act.

The remaining issue is whether First Boston's liability should extend beyond the limitations provided by Section 11 to compensate Chris-Craft for its actual damages as provided by Section 28(a) of the Securities Exchange Act. Since our reading of the lower court opinions in this case indicates that the district court made no findings of fact and drew no conclusions of law regarding the extent of First Boston's culpability in terms of breach of its independent duty as an underwriter, we cannot say, as did the court of appeals, whether, as a matter of law, First Boston's conduct was more than negligent.

Such a determination should be made, in the first instance, by a district court inquiring into that question. Accordingly, the Commission believes it appropriate for this Court to vacate that portion of the order of the court of appeals that imposes liability upon First Boston exceeding that provided, by analogy, under Section 11, and remand the cause for hearing on the question of whether First Boston was more than negligent.

manager, discussed *supra* at pages 38-41, may be significantly different from the role of a mere underwriter of a registered securities offering. The dealer-manager of an exchange tender offer often serves as the "acknowledged general" and principal adviser to the offeror and undertakes responsibility for the soundness of the transaction and the accuracy of the disclosures not only in the offering but in the full panoply of materials used in the attack or defense. In these instances, it is compensated not as an independent underwriter but rather as the offeror's ally, actively participating in the tender offer contest. In addition, it usually receives benefits from the offeror in the form of additional fees which the other underwriters and soliciting dealers do not receive.[366] Where these differences between a traditional underwriter and a dealer-manager exist, it would be inappropriate to apply, by analogy, the liability limitations of Section 11 to an investment banker serving in a dual capacity as underwriter and dealer-manager.[367]

---

[366] It should be noted that Section 11(e) provides that an underwriter's liability is limited only when the underwriter receives, in proportion to the amount of securities underwritten, no greater benefit than other underwriters. Therefore, an underwriter who does receive additional fees from the issuer could be held liable under Section 11(e) for damages exceeding the public offering price of the securities he has directly underwritten. See also, *supra*, pp. 39-41.

[367] The legislative history establishes that Congress specifically chose not to extend the benefits of Section 11 limitations on liability to persons who violate Section 14(e). Senate Hearings, pp. 112, 164; see also, p. 63 n. 156, *supra*.

There could be situations, however, where the misleading prospectus of tender offeror A induces a stockholder to tender his securities in exchange for A's securities instead of tendering them for an offer of B, where the damages of the tendering stockholder might exceed the liability limitations of Section 11.

Here, both the district court and the court of appeals "agree[d]" that, "based on substantial evidence," First Boston, "in its capacity as investment banker * * * merely provided professional services to [Bangor Punta and Piper]," A. 55 n.25. The business decisions that led to violations of the securities laws were initiated by these companies, "not by First Boston in its role of investment banker," *id.* Assuming that First Boston did not act knowingly, these findings of its limited role, if not clearly erroneous, would permit this Court to conclude that First Boston's conduct was more analogous to that of a traditional underwriter and not to that of the usual dealer-manager, and for the application, by analogy, of limitations on damages in Section 11 of the Securities Act.

Moreover, the limitation placed on an underwriter's liability under Section 11 of the Securities Act simply recognizes that the loss suffered by a defrauded purchaser will presumably not exceed the price he paid for the securities. In contrast, the losses incurred by an unsuccessful contestant for corporate control as a result of the misleading practices of a competing tender offeror's dealer-manager may well exceed the total price at which the competitor's securities were offered. In such instances, there is nothing in the Securities Exchange Act that bars the award of fully compensatory damages to the injured tender offeror

for violations of Section 14(e). Certainly from an equitable standpoint, the cost of any actual damage should be borne by the wrongdoer rather than his victim.

Where, however, multiple defendants are found liable for violations of the Securities Exchange Act, a court, in order to reach a more equitable result, may choose to apportion damage liability among the various violators by reference to the extent that each might have profited by the violations, or by reference to the degree of culpability of each defendant,[368] or some combination of these considerations. For example, the court might require defendants who have actively and directly violated the statute, or have done so knowingly, to pay a greater portion of the judgment than those defendants who have been passive violators.[369]

---

[368] *Cf.* Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), which provides for joint and several liability and for contribution on behalf of persons who have become "liable to make any payment" under Section 11 "unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation."

[369] This is consistent with Section 11(f) of the Securities Act. In the instant action, First Boston and the insiders are free to assert the doctrines of contribution and possibly indemnification from other defendants in a separate proceeding, see *e.g.*, *de Haas* v. *Empire Petroleum Co.*, 286 F. Supp. 809, 815-816 (D. Colo., 1968) *affirmed in part and vacated in part*, 435 F. 2d 1223 (C.A. 10, 1970); *Globus* v. *Law Research Serv., Inc.*, 418 F. 2d 1276, 1287-1289 (C.A. 2, 1969), *affirming* 287 F. Supp. 188 (S.D.N.Y., 1968), *certiorari denied*, 397 U.S. 913 (1970). Whether damages should be apportioned has not been litigated and is not before the Court at this time.

Assuming that this Court should conclude that it is appropriate here to award actual damages for violations of the Williams Act, and that such actual damages have been shown, the Commission limits its concern only to the principle that the damages awarded should be sufficient to compensate an injured party to the full extent of its injury. This is so because the Commission must rely upon private parties to "supplement" its own enforcement actions, and that function only will be assured if the damages that are awarded are sufficient to compensate any injured party to the full extent of its loss.[370]

Of course, in circumstances such as these, the operative question is what constitutes the full extent of an injured tender offeror's injury. The district court believed the injury to be compensated was Chris-Craft's lost "opportunity to gain control" of Piper (B. 52). The court of appeals, on the other hand, sought to compensate Chris-Craft for the decline in the value of its Piper holdings suffered when Bangor Punta unfairly gained control of Piper (B. 17-32). Indeed, as the court of appeals correctly found, when Bangor Punta gained control of Piper, the value of Chris-Craft's Piper shares was significantly reduced (B. 18-20, B. 28-32). In such a situation, the award of "actual damages" to Chris-Craft, assuming that

---

[370] Whether or not the general limitations in Sections 11 and 12 of the Securities Act are applied, by analogy, to this action, it seems appropriate that, as in Section 11(e) of the Securities Act, if the defendants can demonstrate that all or part of the plaintiff's damages were the result of factors other than the defendant's wrongdoing, the award of damages should be diminished accordingly.

the necessary element—the causation of those damages by the defendants' unlawful conduct—is shown, should include any reduction in value in order to be compensatory. As the court of appeals explained:

> "Moreover, the [district] court erroneously assumed that our phrase "appraisal value" referred to a statutory appraisal proceeding. Such connotation, had we intended it, would have justified the conclusion that there had been no reduction in the value of CCI's Piper holdings upon BPC's gaining control. Our opinion in *Chris-Craft II*, however, expressly forecloses any such intention. We pointed out at least three times that CCI had sustained injury as the result of BPC's unfairly gaining control and that the injury sustained was a decline in the value of CCI's Piper holdings. First, in assessing the impact of defendants' Section 14(e) violations upon CCI, we stated:
>
> > 'The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control. . . .' 480 F.2d at 375.
>
> "Second, in evaluating the damaging effect of BPC's violations of Rule 10b-6, we held:
>
> > 'BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings.' 480 F.2d at 379.
>
> "Third, in our mandate with respect to the proper measure of damages, we said:
>
> > 'The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position. . . .' 480 F.2d at 380.
>
> "Accordingly, the [district] court's assumption that there had been no such reduction in the value of CCI's Piper holdings was the first step in reaching an erroneous formulation of damages" (B. 18-19).

The district court's theory of damages did not compensate Chris-Craft for its "actual damage." The principle applied by the court of appeals in attempting to compensate Chris-Craft for decline in value of its Piper holdings, to the extent shown and to the extent caused by the wrongful acts of the defendants, in the Commission's view, is correct.[371]

IV. SECURITIES EXCHANGE ACT RULE 10b-6 WAS ADOPTED TO PRECLUDE ACTUAL OR POTENTIAL MANIPULATIVE CONDUCT IN CONNECTION WITH THE PUBLIC DISTRIBUTION OF SECURITIES, INCLUDING EXCHANGE TENDER OFFERS, AND THERE IS A PRIVATE ACTION ON BEHALF OF ANY PERSON ADVERSELY AFFECTED BY VIOLATION OF THE RULE.

"Federal regulation of transactions in securities emerged as part of the aftermath of the market crash in 1929." [372] That regulation was adopted in response to the Senate's intensive study of Stock Exchange

---

[371] The precise method of computing damages in accordance with the general principle that the court of appeals purported to apply is a matter as to which the Commission expresses no position.

[372] *Ernst & Ernst* v. *Hochfelder, supra,* 96 S. Ct. at 1381.

Practices,[373] a principal focus of which was the manipulative devices that had led to the crash.[374] Indeed, the Report itself noted that "[t]he exposure of the extent and effect of manipulative practices upon organized exchanges was one of the most salutory and important accomplishments of the investigation." [375] And, the results of that investigation "laid the foundation for remedial legislation in a field heretofore unregulated." [376]

---

[373] Senate Committee on Banking and Currency, *Report on Stock Exchange Practices*, S. Rep. No. 1455, 73d Cong., 2d Sess. (1934).

The Senate's study commenced on April 11, 1932, and finished more than two years later, on May 4, 1934, after compiling 12,000 printed pages of testimony and 1,000 pages of exhibits. *Id.*, at pp. 2-3.

[374] *Id.*, at pp. 30-54.

[375] *Id.*, at p. 30.

[376] S. Rep. No. 792, 73 Cong., 2d Sess. 3 (1934).

Prior to the adoption of the Securities Exchange Act of 1934, "[t]he legal approach to the problem of market manipulation was primarily through the concept of fraud." Comment, *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509, 516 (1947); *accord*, Berle, *Liability for Stock Market Manipulation*, 31 Col. L. Rev. 264 (1931). As one commentator noted, "the reach of [the] strict fraud doctrine was * * * far too short * * *. In the United States prior to 1934 no case established the illegality of any form of manipulation by actual purchases and sales * * *." Comment, *Regulation of Stock Market Manipulation, supra*, 56 Yale L.J. at 516-517. But see, *United States* v. *Brown*, 5 F. Supp. 81 (S.D. N.Y., 1933), *affirmed*, 79 F.2d 321 (C.A. 2), *certiorari denied, sub nom. McCarthy* v. *United States*, 296 U.S. 650 (1935); Berle, *Liability for Stock Market Manipulation, supra*, 31 Col. L.Rev. 264; Berle, *Stock Market Manipulation*, 38 Col. L.Rev. 393 (1938).

In considering legislative approaches to manipulative conduct, Congress was concerned with the importance of securities exchanges to the overall economic well-being of the Nation, and its concern was reflected in Section 2 of the Act.[377] Thus, Congressional concern with manipulative devices was not limited to the damaging effects manipulative conduct could have on individual investors, although those effects were of sufficient concern to warrant the provision of express remedies for investors actually damaged by manipulative conduct.[378] Rather, Congress was concerned with the honesty and fairness of the marketplace for securities,[379] and feared that disorderly and unfair markets either could induce excessive speculation,[380] which, in turn, could wreak economic havoc, or could paralyze would-be investors and precipitate the allocation of their savings to investment devices other than securities.

---

[377] See Section 2(3) of the Securities Exchange Act, 15 U.S.C. 78b(3).

[378] Section 9(e) of the Securities Exchange Act, 15 U.S.C. 78i(e).

[379] See, *e.g.*, H.R. Rep. No. 85, 73 Cong., 1st Sess. 1-5 (1933).

[380] See H.R. Rep. No. 1383, 73d Cong., 2d Sess. 11 (1934):

> "the accentuation of temporary fluctuations and the deliberate introduction of a mob psychology into the speculative markets by the fanfare of organized manipulation menace the true functioning of the exchanges upon which the economic well-being of the wholy country depends."

> "Behind the anti-manipulative provisions as a whole was the conviction that manipulation bred excessive speculation and unstable security prices which, irrespective of fraud, injured the public by unsettling the credit cycle and interfering with the proper performance of the market function in valuing securities." [381]

This broader purpose led the Congress to adopt far-reaching proscriptions and regulatory controls for manipulative devices of all types. And, the specific provisions adopted to prohibit manipulative devices are "[t]he very heart of the Act." [382]

In structuring its legislative response to manipulative conduct, Congress was well aware that there were widely-varying devices used to stimulate or discourage the buying and selling of securities and that the easy negotiability of securities made the securities markets highly susceptible to that type of conduct.[383]

---

[381] Comment, *Regulation of Stock Market Manipulation, supra,* 56 Yale L.J. at p. 521 (footnote omitted).

[382] Securities and Exchange Commission, *Report on Proposals for Amendments of the Securities Act of 1933 and the Securities Exchange Act of 1934,* H.R. Comm. Print, 77th Cong., 1st Sess. 50 (1941).

[383] See, *e.g.,* Mathias, *Manipulative Practices and the Securities Exchange Act,* 3 U. of Pitt. L.Rev. 7, 104 (1934); Moore & Wiseman, *Market Manipulation and the Exchange Act,* 2 U. of Chi. L.Rev. 46 (1934); Comment, *Market Manipulation and the Securities Exchange Act,* 46 Yale L.J. 624 (1937); Comment, *Regulation of Stock Market Manipulation,* 56 Yale L.J. *supra,* at p. 509, 512.

While it was apparent that a leading manipulative device was fraudulent publicity, whether directed to the market generally or directed to a specific security,[384] the record compiled by the Senate in its investigation of Stock Market Practices revealed that a more effective means of manipulation was the use of the market itself to reflect actual or apparent trading activity. Congress found that the notorious "pool" operators of the 1920's and 1930's [385] were not above arranging securities transactions for the purpose of creating the appearance of independent market activity, the effect of which was to alter the independent price-valuation mechanism of the exchange markets.[386] Persons engaged in such manipulation

---

[384] See, *e.g.,* Twentieth Century Fund, Inc., *The Securities Markets* 478 (1935).

[385] "A pool * * * is an agreement between several people, usually more than three, to actively trade in a single security. * * * [T]he purpose of a pool generally is to raise the price of a security by concerted activity on the part of the pool members, and thereby to enable them to unload their holdings at a profit upon members of the public attracted by the activity or by information disseminated about the stock. Pool operations for such a purpose are incompatible with the maintenance of a free and uncontrolled market" (footnote omitted).

S. Rep. 1455, 73d Cong., 2d Sess. 31 (1934).

[386] As the Senate Report noted,

> "The true function of the exchanges is to maintain an open market for securities, where supply and demand may freely meet at prices uninfluenced by manipulation and control."

S. Rep. No. 1455, 73d Cong., 2d Sess. 30 (1934); see also, Berle, *Liability for Stock Market Manipulation, supra,* 31 Col. L.Rev. at pp. 266-267.

would arrange to have both buy and sell orders entered for the same security at the same price, producing a recorded transaction in the market indistinguishable from the external appearance of a normal transaction executed by independent and random buyers and sellers. In recognizing that those pool-fomented activities—"wash" sales and "matched orders" [387]—created "a false and deceptive appearance of genuine demand for the security * * *," Congress rejected the "[a]ttempts * * * to differentiate between 'beneficent' pools and 'nefarious' pools." Instead, it concluded that,

> "From the viewpoint of the purchaser outside the pool circle, there is no substantial or ethical difference in these two types of pools. Although the purpose may be different, the means employed are identical. In all cases fictitious activity is intentionally created, and the purchaser is deceived by an appearance of genuine demand for the security. *Motive furnishes no justification for the employment of manipulative devices.*" [388]

---

[387] In *Ernst & Ernst* v. *Hochfelder*, *supra*, 96 S. Ct. at 1386 n. 25 (1976), this Court appropriately defined wash sales and matched orders as follows:

> " 'Wash' sales are transactions involving no change in beneficial ownership. 'Matched' orders are orders for the purchase sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security".

[388] S. Rep. No. 1455, *supra*, at p. 32 (emphasis supplied). The evil sought to be proscribed was the creation of an appearance of false demand, irrespective of the ends the pool operators were seeking to achieve. See p. 171, *infra*.

But, unlike wash sales, and matched orders, for which no justification could be found, Congress repeatedly was made aware that stabilizing activities in the face of a distribution of securities,[389] could have legitimate purposes, and that the United States government itself had engaged in stabilizing conduct in its own sales of certain securities and commodities.[390]

---

[389] Stabilization has been described as follows:

> "When [a] * * * distribution begins, whether the distribution price has been raised by manipulation or not, it will be in the interest of the distributors to maintain that price on the market throughout the course of the distribution. The market price may be subject to depression from a number of causes. Speculators or investors who have changed their minds may dump on the market the stocks which they bought on the direct distribution. Market conditions as a whole may become unfavorable. Buyers who would normally absorb sales in the open market may transfer their interest to the shares being distributed * * *. To counteract these effects the distributors support the market price by entering bids and by purchasing * * * to absorb selling pressures encountered.
>
> The converse of purchasing to raise the market price is selling to depress it. A well-timed number of sell orders, if sufficient in volume to overcome buying pressure, may succeed in driving the market price of a security down to a point at which it can be bought back at a profit."

Comment, *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509, 514 (1947) (footnote omitted). See also, Securities and Exchange Commission, *Statement on Regulation of "Pegging, Fixing and Stabilizing" of Securities Prices*, Securities Exchange Act Rel. No. 2446 (Mar. 18, 1940).

[390] "When the original draft of the bill was before the House and Senate committees at public hearings * * * [i]t was

In drafting the Securities Exchange Act, therefore, Congress attempted to deal separately and specifically with the varying forms of manipulation to which it had been exposed. Since Congress recognized that any beneficently-motivated large purchases or sales of a security could also raise or depress the market price of the traded security,[391] it took care to insure that its efforts to proscribe manipulative conduct not be drafted in such a fashion as to prohibit legitimate trading activities not properly the subject of restrictive legislation. Accordingly, where classes of trading, appropriately described as manipulative, appeared "to serve no legitimate function," [392] they were "specifically prohibited." [393] In other areas, the Congress recognized that "so delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program." [394] As a result,

---

pointed out that the Government in recent times, particularly, has resorted to stabilizing or pegging processes to stabilize the market in the issuance and distribution of Government securities, and the point was made that that proved that there is some benefit to the public in certain kinds of pegging processes or stabilizing processes. It was in deference to that argument, based upon the example of governmental activities, that this clause [Section 9(a)(6)] was written."

Senate Committee on Banking and Currency, *Hearings on Stock Exchange Practices*, 73d Cong., 1st Sess., 7736 (1934) (remarks of Mr. Pecora).

[391] S. Rep. 792, 73d Cong., 2d Sess. 7 (1934).

[392] *Id.*

[393] *Id.*

[394] *Id.*, at p. 5.

broad rulemaking authority was vested in the Securities and Exchange Commission—authority referred to by the Congress as a "discretionary and elastic" power—in order

> "to avoid, on the one hand, unworkable 'straitjacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business." [395]

Section 9 of the Act is the embodiment of the major Congressional effort to assure the maintenance of free and open securities markets, in which prices would be determined by natural forces of supply and demand, not by manipulative devices inflating or depressing prices artificially.

Some of the specific provisions dealing with manipulation in Section 9 trace their origin to the law of fraud. Thus, Section 9(a)(1) prohibits wash sales and matched orders if effected "for the purpose of creating a false or misleading appearance of active trading in any security * * * or a false or misleading appearance with respect to the market for any such security." [396] Similarly, Section 9(a)(4) of the Act forbids "false or misleading statements" with regard to material facts in inducing the purchase or sale of

---

[395] *Id.*

[396] See Comment, *Regulation of Stock Market Manipulation*, *supra*, 56 Yale L.J. at 519:

> "This phraseology [in Section 9(a)(1)] treats the wash sale and matched order as a form of misrepresentation; it is an expanded concept of fraud, however, since there need be no showing of damage to anyone."

a registered security, also embodying a fraud concept.[397]

And, Sections 9(a)(3) and 9(a)(5) proscribe the use of tips of impending manipulative price changes to induce purchases or sales of securities. "The policy of insulating the public from incentives to excessive speculation is the primary aim here rather than the protection of purchasers and sellers from fraud."[398]

These specific provisions in Section 9 are complemented by the more general, but broader ranging, proscriptions contained in Section 9(a)(2) of the Act, the purpose of which is to make unlawful not only pool operations, but "every other device used to persuade the public that activity in a security is the reflection of genuine demand instead of a mirage." S. Rep. No. 1455, 73d Cong., 2d Sess., 54 (1934).[399] In an attempt to deal with the concern of many wit-

[397] "It is not an element of the offense under this section [9(a)(4)] that the misleading statement be made directly to a prospective seller or purchaser." 3 Loss, *Securities Regulation* 1543 (2d ed., 1961).

[398] Comment, *Regulation of Stock Market Manipulation, supra*, 56 Yale L.J. at p. 520 (footnote omitted).

[399] In contrast to Section 9(a)(1) of the Act—which proscribes wash sales and matched orders only if intended to mislead—Section 9(a)(2) proscribes manipulation by actual purchases and sales if intended to induce others to buy or sell the security. Section 9(a)(2), the Commission held early in its administration of the Act, thus permits the condemnation of activities which fall far short of "actual fraud." *In the Matter of White & Weld*, 3 S.E.C. 466, 513 (1938); see also, Herlands, *Criminal Law Aspects of the Securities Exchange Act of 1934*, 21 Va. L. Rev. 139 (1934).

nesses that "pegging, fixing, or stabilizing" the price of registered securities might not always prove objectionable, however, Congress also adopted Section 9(a)(6) of the Act, as an exception, of sorts, to the blanket prohibitions contained in Section 9(a)(2). Section 9(a)(6) prohibits stabilizing transactions only if they are effected in contravention of Commission regulations. "[I]t leaves it entirely within the discretion of the * * * Commission to say what kind of pegging or stabilizing operations may be permitted as deemed to be in the public interest."[400]

But, Congress also realized that the detailed scheme of Section 9 of the Act would not, by its very terms, reach those securities traded only in the over-the-counter securities markets and that it was impossible to catalogue every device which might prove manipulative.[401] Accordingly, it enacted Section 10(b) of the Act, making it unlawful to employ, in connection with the purchase or sale of *any* security, "any ma-

[400] Senate Committee on Banking and Currency, *Hearings on Stock Exchange Practices*, 73d Cong., 1st Sess., 7736-7737 (remarks of Mr. Pecora).

[401] See, *e.g.*, 3 Loss, *Securities Regulation, supra*, at 1546:

> "It is not altogether correct to speak of § 9 as coextensive with manipulation of the *exchange* markets. On the one hand, it applies to over-the-counter manipulation of registered securities * * *. On the other hand, § 9 does not apply to exempted securities even when they are traded on an exchange; there the attack on manipulation is made on the same basis as it is with respect to securities which are traded solely in the over-the-counter market" (footnotes omitted, emphasis in original).

nipulative or deceptive device or contrivance" in contravention of rules and regulations proscribed by the Commission "as necessary or appropriate in the public interest or for the protection of investors." Similarly, Section 15(c)(1) of the Act was adopted to prohibit brokers and dealers in securities from effecting any transaction in, or inducing the purchase or sale of, a security over-the-counter, by means of "any manipulative, deceptive or other fraudulent device or contrivance" as defined by the Commission. "[T]he antifraud provisions of the 1933 and 1934 acts have been held in the case of securities traded solely in the over-the-counter market to impose substantially the same prohibitions as § 9(a)." [402]

In sum, the Act attacks manipulative conduct through outright proscriptions, both specific and general, through generalized rulemaking powers to prohibit other forms of manipulation not specifically catalogued, and through clearly defined regulatory powers; it seeks to assure that those trading activities not improper *per se*, but carrying the potential for adverse manipulative consequences, would be employed only under carefully circumscribed conditions subject to monitoring by the Commission. But, unlike the Act's antifraud provisions, which have as their primary purpose the counteraction of deception of a personalized nature,

> "The antimanipulative provisions of the Securities Exchange Act are directed not only against

[402] 3 Loss, *Securities Regulation, supra,* at 1573.

> the defrauding of unwary investors but [are directed] with equal force against the impediments to a free and open market created by artificial stimulants or restraints." [403]

In implementing its broad mandate, the Commission's initial approach to the regulation of stabilizing activities has been described as a cautious one.[404] In its first five years, it did not adopt any rules respecting stabilization, and then, in 1939, its first attempt at rulemaking consisted solely of "a relatively simple disclosure rule." [405]

In 1940, however, the Commission adopted its first substantive regulation of stabilizing—Regulation X-9A6-1.[406] The regulation was designed to deal with primary or secondary distributions of securities offered "at the market"—that is, securities distributed at the prevailing market price, or very close to it. Because such an offering inherently carries with it the representation that the market price at which the security is being sold is a fair and unmanipulated price, the Commission's rule established restrictions on the extent of stabilizing activities and prescribed disclosure requirements as well. Shortly thereafter, the Commission issued a policy statement, discussing its difficulties with stabilizing, recognizing

[403] *In the Matter of Masland, Fernon & Anderson,* 9 S.E.C. 338, 344 (1941).

[404] 3 Loss, *Securities Regulation, supra,* at 1574.

[405] *Id.*

[406] Securities Exchange Act Rel. 2363 (Jan. 3, 1940).

all stabilizing activities as manipulative, and indicating its concern that, in the absence of stabilizing, or a meaningful substitute for it, American underwriters would be unable to assist industry in raising necessary capital.[407] And, the Commission indicated its intention to monitor stabilizing activities, and proposed substitute, or additional, stabilizing regulations predicated upon its experience with Regulation X-9A6-1.[408]

Securities Exchange Act Rules 10b-6, 10b-7 and 10b-8 eventually superseded Regulation X-9A6-1, and were prompted by a Commission investigation of manipulative activities uncovered in connection with an unsuccessful common stock offering of Kaiser-Frazer Corporation in February, 1948. In connection with its investigation, the Commission sought public comment on the need to adopt rules or recommend additional legislation regarding stabilizing purchases and on the adequacy of its existing regulations in the area of manipulative conduct.[409]

While little of substance resulted from the Commission's request for public comments,[410] in 1952, the Kaiser-Frazer offering and attendant market problems became the subject of hearings by a subcommittee of the House Committee on Interstate and Foreign Commerce. The subcommittee found that the

[407] Securities Exchange Act Rel. 2446 (Mar. 18, 1940).

[408] *Id.*

[409] Securities Exchange Act Rel. 4163 (Sept. 16, 1948).

[410] 3 Loss, *Securities Regulation, supra,* at 1581.

Kaiser-Frazer debacle "cast some doubt on the effectiveness of the statute, or on the administration thereof by the Commission * * *." [411] The subcommittee concluded:

> "In 1940 [the Commission] stated its intention to proceed somewhat by trial and error [in applying the Act's anti-manipulative provisions to pegging, fixing and stabilizing practices] until it could develop the facts and arrive at some recommendation which it might present to the Congress. It is apparent that during the ensuing years [the Commission] has proceeded chiefly by interpretation in individual cases, and has not promulgated any rules or regulations covering the major practices, as the statute requires it to do. * * *
>
> "We are of the belief that the Commission earnestly and expeditiously should grapple with this problem, with the view either of the early promulgation of rules publicly covering these operations, or of recommending to the Congress such changes in legislation as its experience and study now show to be desirable." [412]

In response to this directive, Rules 10b-6, 10b-7 and 10b-8 were proposed by the Commission in 1954 [413] and, after extensive comments, a public hearing and

[411] H.R. Rep. No. 2508, 82d Cong., 2d Sess. (1952).

[412] *Id.*, at 116.

[413] Securities Exchange Act Rel. No. 5040 (May 18, 1954).

publication of a revised proposal,[414] these rules were adopted in 1955.[415] Evidencing the origin and subject matter of these rules, the Commission adopted them pursuant to *both* Sections 9(a)(6) and 10(b) of the Act.

The rules deal generally with practices intended, among other things, to peg, fix or stabilize the price of securities during their distribution to the public. They are designed to ensure the preservation of fair and honest markets for securities both registered on an exchange and those traded exclusively over-the-counter. Together, the rules are intended to prevent certain types of trading abuses which the Commission, after twenty-one years of experience in detecting and attempting to prevent manipulative and deceptive trading during securities distributions, determined were used widely to establish artificial and misleading price levels in the market place to facilitate the efforts of those attempting to sell substantial amounts of securities to the public.[416]

Consistent with the statutory presumption that not all stabilizing activities were necessarily detri-

[414] Securities Exchange Act Rel. No. 5159 (Apr. 19, 1955).

[415] Securities Exchange Act Rel. No. 5194 (Jul. 5, 1955).

[416] These activities had been the subject of Commission enforcement efforts from the very inception of its administration of the Act. See, *e.g.*, *Halsey Stuart & Co.*, 30 S.E.C. 106, 111-112 (1949); *Federal Corporation*, 25 S.E.C. 227 (1947); *Thompson Ross Securities Co.*, 6 S.E.C. 1111, 1122 (1940); *Canusa Gold Mines, Ltd.*, 2 S.E.C. 548, 554-555 (1937).

mental to the public and the maintenance of fair and honest markets, however, the rules do not absolutely proscribe all stabilizing conduct that falls within their terms. Rather, classes of market activities, acceptable as a general proposition, are set forth in the rules, and, in addition, each of the rules provides for additional, *ad hoc*, exemptions upon application to the Commission, and a determination by it that the transaction, or series of transactions, for which an exemption is sought will not be conducted in such a way as to have a manipulative or deceptive effect on the markets.[417]

Rule 10b-6, which was found to have been violated in this case, is aimed at protecting the existing market place for securities which become the subject of a "distribution."[418] "Manipulation was often accomplished by those about to sell securities or already engaged in selling securities bidding on the market for the same securities, thereby creating an unjustifiable impression of market activity which would

[417] See 17 C.F.R. 240.10b-6(f); 17 C.F.R. 240.10b-7(*o*); 17 C.F.R. 240.10b-8(f).

[418] "The term 'distribution' as used in Rule 10b-6 is to be interpreted * * * as covering offerings of such a nature or magnitude as to require restrictions upon open market purchases by participants in order to prevent manipulative practices. For these purposes a distribution is to be distinguished from ordinary trading transactions and other normal conduct of a securities business upon the basis of the magnitude of the offering and particularly upon the basis of the selling efforts and selling methods utilized."

Bruns, Nordeman & Co., 40 S.E.C. 652, 660 (1961).

facilitate the sale at artifically high prices. This was one of the practices which the Securities Exchange Act was designed to eradicate, and it is the practice which is covered by Rule [10b-6]." [419]

Accordingly, Rule 10b-6 makes it unlawful for persons connected with the distribution of securities—such as the issuer of the securities, the underwriter, or participating broker-dealers and others similarly situated—to bid for or purchase any security which is the subject of the distribution, or any security which may constitute a right to purchase the class of securities being distributed, until after those persons have completed their part in the distribution. The Rule delineates eleven categories of transactions not considered to raise the potential for manipulation of the marketplace, and these transactions are explicitly exempt from the Rule's coverage. "The rationale [of the rule] is that a potential purchaser of the securities being distributed should not be induced into buying them because of abnormal market pressures driving the price up through secret purchases by the issuer or [its] underwriters." [420]

---

[419] *Securities and Exchange Commission* v. *Scott Taylor & Co.*, 183 F. Supp. 904, 907 (S.D. N.Y., 1959). *Accord, e.g., Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (S.D. N.Y., 1967); *In the Matter of Collins Securities Corp.*, 8 *S.E.C. Docket* 250, Securities Exchange Act Rel. No. 11766 (Oct. 23, 1975), *appeal pending*, No. 75-2200 (C.A. D.C.); Weiss & Leibowitz, *Rule 10b-6 Revisited*, 39 Geo. Wash. L. Rev. 474, 476-477 (1971).

[420] Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 666 (1973).

Of key importance in this case is the fact that Rule 10b-6 precludes open market purchases both of the securities directly being (or about to be) distributed, and of other securities or instruments which are convertible into the securities directly being distributed. In this case, Bangor Punta is alleged to have made "secret purchases" of Piper securities at the same time that it was publicly offering to "distribute" Bangor Punta securities, and Piper securities were convertible into Bangor Punta securities. As the court below correctly, and succinctly, held:

> "Rule 10b-6 prohibits bids for or purchases of a security by or on behalf of the issuer of a security if the security is 'the subject of * * * [a] distribution.' Included within the prohibition are bids for or purchases of 'any right to purchase any such security.' Clearly here, Piper stock, within the meaning of Rule 10b-6, was a 'right to purchase' [Bangor Punta] stock." [421]

The incentive for persons interested in a distribution of securities to manipulate the market for "rights to purchase"—or securities convertible into—the securities being distributed varies according to the type of distribution. In a public offering of securities that is underwritten, for example, the issuer and its underwriters may be tempted to "rig" the market in order to preclude or inhibit sales prior to, or during, the period in which securities are to be distributed, in order to avoid any depressing effect that open

---

[421] A. 63.

market sales of the same securities might have on the price at which the new securities are to be offered.

Instruments convertible into the securities being distributed also can, potentially, depress the offering price of the securities to be distributed, when the market price of the instruments, in relation to the price of the securities to be distributed, would encourage the conversion and subsequent sale of the securities obtained upon conversion. In such a situation, the breadth of Rule 10b-6 is necessary to preclude persons interested in a distribution from attempting to effect purchases of the convertible instruments in such a way as to raise their price. An increase in the market price of the convertible instruments could make the exercise of conversion rights economically unattractive and preclude open market sales of the securities that are the subject of the distribution.[422]

---

[422] For example, assume that an issuer has a publicly-traded class of common stock outstanding, with a market price of $20 per share, and also has outstanding a class of warrants to purchase that common stock at an exercise price of $15 per share. Assume also that the warrants sell at a current market price of $5 per share.

If the conversion feature of the warrants is exercised, and the common stock obtained as a result is sold, those sales of the common stock can depress the market price of the common stock. If the issuer is planning a public offering of the same common stock at a price of $20 per share, the unfettered conversion of the warrants into the issuer's common stock, and the subsequent sale of the common stock obtained as a result, if effected immediately prior to, or during, the new distribution of common stock, could compel the issuer to lower its offering price to reflect the market price prevailing at the time of the offering.

In order to facilitate its distribution of common stock, and to maximize the proceeds obtained from that distribution, the issuer may be tempted to make aggressive purchases of its own warrants, driving their price to, say, $6 per warrant. In that event, the exercise of the warrant, and subsequent sale of the securities so obtained, would be uneconomical—it would yield only $20 at a cost of $21: $15 representing the cost of exercising the warrant, and $6 representing the purchase price of the warrant.

In an exchange tender offer, there are additional manipulative temptations and opportunities that can be seized in connection with transactions in securities which are convertible into the securities being distributed. As the court below concluded, there are "decided benefits" which can result from an exchange offeror's purchases of a target company's securities:

> "If the price of the target company's stock does increase in response to cash purchases by the exchange offer or [sic] after the offer has been announced, many shareholders in the target company are likely to assume that the price increase results solely from the bullish effect of the exchange offer on the market. Small investors especially would be likely to assume that the exchange offer was receiving serious attention and approbation from larger, more knowledgeable investors than they. The managements of either the target company or the offeror can compound this impression by announcing the number of shares of target stock acquired by the offeror since the initiation of the exchange offer. Absent some indication to the contrary, the target

company shareholders would be likely to assume that the entire increase resulted from the offer, not from cash purchases in addition to the offer." [423]

Nor are the events in this case unusual. Prior to the adoption of Securities Exchange Act Rule 10b-13, expressly governing cash purchases of target company securities by tender offerors,[424] it was not uncommon, although not proper, in competing offers for corporate control for one offeror to purchase the target company's securities directly in the open market, in a manner designed to raise the price of the target

[423] C. 17.

[424] Securities Exchange Act Rel. No. 8712 (Nov. 10, 1969). Rule 10b-13 provides in pertinent part, that:

> "No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected."

The rule also provides that the Commission may exempt "any transaction upon written request or upon its own motion," 17 C.F.R. § 240.10b-13(d). Had Rule 10b-13 been in effect at the time of Bangor Punta's purchases here, those purchases would have violated the rule, unless they had been exempted by the Commission. 17 C.F.R. 10b-13(a).

company's securities above the level of the competing offer, in order to defeat that offer.[425]

The various briefs of each of the parties to this action seek to apply or distinguish this Court's recent decisions in *Blue Chip Stamps* v. *Manor Drug Stores* [426] and *Ernst & Ernst* v. *Hochfelder*,[427] both of which analyze implied private remedies under Rule 10b-5, in determining whether there is implied standing in Chris-Craft to sue for a violation of Rule 10b-6, and whether there should be any limitations upon the scope of such a remedy if implied, or the relief to be granted under it. Those decisions may well be inapplicable to this case (see pages 137-140, 149-159, *supra*), but if applicable should not militate against the maintenance of an action under Rule 10b-6 as the lower court held.

As noted above, the class of persons intended to be protected from the effects of the manipulative conduct encompassed within Rule 10b-6 includes all users of the markets for the relevant securities—that is, the securities being distributed, or rights to purchase the securities being distributed. Viewed in this light, this Court's recent decsion in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, presents no impediment to the maintenance of an action under Rule

[425] See 5 Securities and Exchange Commission, *Report of Institutional Investor Study*, H.R. Doc. No. 92-64, 92d Cong., 1st Sess. 2804-2806, 2832 (1971).

[426] 421 U.S. 723 (1975).

[427] 96 S. Ct. 1375 (1976).

10b-6 by a defeated offeror against a competitor for violations of the Rule.

As this Court stated in *Blue Chip Stamps*, only those potential plaintiffs who neither bought nor sold relevant securities "either in a new offering or on the Nation's post-distribution trading markets," are barred from recovery in actions based upon Section 10(b) of the Act. 421 U.S. at 737. But, where a defeated offeror has purchased relevant securities—the target company's stock—it is precisely the kind of purchaser intended to be afforded a private remedy in actions grounded upon Section 10(b). There is no danger in such a case, contrary to the danger this Court perceived existed in *Blue Chip Stamps*, that recognizing standing will permit a class of plaintiffs to sue for

> "intangible economic injury such as loss of a noncontractual opportunity to buy or sell * * * seeking a largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective hypothesis."

421 U.S. at 734-735. Nor is there any requirement of direct privity between the plaintiff and the alleged market manipulator in a Rule 10b-6 action, for, as this Court stated in *Blue Chip Stamps:*

> "In today's universe of transactions governed by the Securities Exchange Act of 1934, privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule. * * * Obviously neither

> the fact that issuers or other potential defendants under Rule 10b-5 reach a large number of potential investors, or the fact that they are required by law to make their disclosures conform to certain standards, should in any way absolve them from liability for misconduct which is proscribed by Rule 10b-5."

421 U.S. at 723

Moreover, a violation of Rule 10b-6, once established, should not also require an additional showing that the violative acts had a specific manipulative effect on the market.[428] That, more properly, is an argument to be addressed to the Commission in advance of the transaction.[429] The prohibition against

---

[428] The manipulative potential of an exchange offeror's purchases of the target company's stock during the exchange offer (and the potential damage distortion of the market for the target's stock would inflict) has already been discussed (see pp. 181-184, *supra*). Nor could the subsequent disclosure of unlawful purchases cleanse those purchases of their manipulative effects; indeed, if anything, such disclosure would accentuate that effect by presenting to the public a heightened current market price for the securities offered in exchange. This is precisely the kind of manipulative possibility Rule 10b-6 was designed to preclude. *Cf., Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F. 2d 787 (C.A. 2, 1969).

[429] As noted above (p. 179, *supra*) subsection (f) of Rule 10b-6 was adopted precisely to permit the Commission and its staff to consider such assertions, and to require such conditions to the transaction as would ensure the absence of an adverse manipulative effect. No such application was made here, preventing the Commission's staff from assuring that appropriate precautions against manipulative market effects were undertaken by the purchaser.

purchasing "rights to purchase" securities of the class being distributed, as well as against purchasing securities of that class, has been set forth clearly in Rule 10b-6 since its inception.[430] It is one thing, in a case involving an assertion of liability under Rule 10b-5, based upon negligence, as in *Ernst & Ernst* v. *Hochfelder*, *supra*, to conduct an inquiry into the defendant's intent under the specific circumstances there presented, especially in light of Rule 10b-5's general prohibitions against employing any "artifice to defraud" or engaging in acts which "would operate as a fraud or deceit upon any person" (prohibitions as general and all-encompassing as Section

[430] The application of the prohibition against acquiring "rights to purchase" during a distribution to the securities of a target company in an exchange offer was generally understood prior to the inception of this case. For example, a seminal law review article on the subject by William Ward Foshay (a member of the New York Law firm of Sullivan & Cromwell, and counsel to First Boston in this action), entitled *Market Activities of Participants in Securities Distributions*, 45 Va. L.Rev. 907, 920-921, 931-932 (1959) (reprinted in Section of Corporation, Banking and Business Law of the American Bar Association, *Selected Articles on Federal Securities Law* 747 (1968)), quite cogently discussed the applicability of Rule 10b-6's prohibitions to purchases of target company stock and the need to obtain an exemption from those prohibitions (pursuant to Rule 10b-6(f)) as a prerequisite to such purchases.

Moreover, prior to the events in issue in this action, the Commission published Securities Exchange Act Rel. No. 8595 (May 5, 1969), proposing the adoption of Securities Exchange Act Rule 10b-13, which explicitly sets forth this requirement. In its release, the Commission noted that the proposed rule represented "a codification of existing interpretations under Rule 10b-6."

10(b) itself). It is quite another thing, however, to require the same kind of inquiry and proof where the particular act complained of is specifically proscribed by a Commission rule designed to prevent the occurrence of that very act in the very context in which it occurred, all in the interests of preventing manipulation of the marketplace.[431]

Thus, where the Commission has performed with specificity the task set before it by the Congress in the Act—to define acts which are fraught with the potential for fraud, deceit and manipulation and to adopt means reasonably designed to prevent them—it should be necessary to prove only that Rule 10b-6 was knowingly violated,[432] that the complaining party

[431] "[Rule 10b-6] proscribes and clearly defines a *practice* which has, prior to 1955, been used fraudulently to distort the 'over-the-counter' market." *Jaffee & Company* v. *Securities and Exchange Commission*, 446 F. 2d 387, 391 (C.A. 2, 1971) (emphasis in original).

[432] It is not contested that Bangor Punta's purchases of Piper stock were made knowingly and for the purposes of defeating Chris-Craft's competing offer. The so-called scienter question, therefore, can be resolved by the undisputed facts that Bangor Punta intended to do what it did, and that the kind of act in which it engaged has been defined by the Commission within its express authority as constituting a "manipulative or deceptive device or contrivance." *Cf. Herzfeld* v. *Laventhal, Krekstein, Horwath & Horwath*, CCH Fed. Sec. L. Rep. ¶ 95,660 (C.A. 2, 1976); *Bailey* v. *Meister Brau, Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,543 (C.A. 7, 1976). This case does not involve "negligent conduct alone," as did *Ernst & Ernst* v. *Hochfelder, supra*. Intentional acts which violate Rule 10b-6 are enough, for, "where the rule applies, its prohibitions

purchased or sold securities of the manipulated class, and that the complaining party was actually and demonstrably injured as a result of the violative conduct.

Any other result would render nugatory the "discretionary and elastic" powers granted to the Commission to root out and proscribe particular manipulative and deceptive practices.[433] If a general inquiry as to each rule violator's intentions in violating the Commission's specific antimanipulative rules, and the effects of such violations, is required in each case, there would be no need for specific rules. Rule 10b-5 itself would be enough, and would accomplish all that the Commission could do under such circumstances to prevent manipulation of the Nation's trading markets: for, the same standards of proof would be required for all manipulative and deceptive acts and practices, irrespective of whether certain types of acts and practices could be isolated, defined, and explicitly proscribed by the Commission. Specific proscriptions, in such a circumstance, would be rendered ineffectual. The seeds of such a conclusion are not to be found in this Court's recent decisions.

---

are absolute." *Jaffee & Company* v. *Securities and Exchange Commission, supra,* 446 F. 2d at 391; see also, *Miller* v. *Steinbach,* 268 F. Supp. 255, 279-280 (S.D. N.Y., 1967); *Securities and Exchange Commission* v. *Resch-Cassin & Co., Inc.,* 362 F. Supp. 964 (S.D. N.Y., 1973), appeal pending, Docket No. 73-2144 (C.A. 2).

[433] See discussion, *supra,* at 170-171.

Moreover, Rule 10b-6 is an antimanipulative rule, and, as we have seen, is intended to deal with certain stabilizing problems pursuant to the Commission's authority under *both* Sections 9(a)(6) and 10(b) of the Act. And, Section 9(e) of the Securities Exchange Act *expressly* creates a private right of action against "[a]ny person who willfully participates in any act or transaction in violation of * * *" Section 9(a) of the Act. Accordingly, limitations on the right of Chris-Craft to sue Bangor Punta, and any limitations upon any recovery to be obtained for violations of Rule 10b-6, should be consistent with the terms of Section 9(e), not the parties' interpretations of this Court's decisions under Rule 10b-5.

Section 9(e) establishes its own purchaser-seller test, and its own causation-in-fact test, as a predicate to the maintenance of an express private remedy for violations of Rule 10b-6. While a prospective plaintiff under Section 9(e) must be an actual purchaser or seller of securities,[434] the section does not require the purchase or sale of a specific security. Rather, and incorporating a causation-in-fact standard, the section requires only that the purchase or sale be of "*any*

---

[434] See, *e.g., Surowitz* v. *Hilton Hotels Corporation,* 342 F. 2d 596, 603 (C.A. 7, 1965); *reversed on other grounds,* 383 U.S. 363 (1966); *Copperweld* v. *Imetal,* 403 F. Supp. 579, 595 (W.D. Pa., 1975); *In re Penn Central Securities Litigation,* 347 F. Supp. 1327, 1343 (E.D. Pa., 1972); *DiJulio* v. *Digicon Inc.,* 339 F. Supp. 1284, 1291 (D. Md., 1972).

security at a price which was affected by" "any act or transaction in violation of * * *" Section 9 of the Act (emphasis supplied).[435] "[D]amages sustained as a result of any such action or transaction" may be recovered by the purchaser, and contribution proceedings are expressly authorized.[436]

Thus, Section 9(e), as noted, requires that a plaintiff prove that the defendant "willfully partici-

[435] The statutory reference to "any" security was not inadvertent. See, *e.g.*, S. Rep. No. 1455, 73d Cong., 2d Sess. 100 (1934), confirming the fact that "manipulation has also taken the form of raising and pegging the price of comparable issues * * *." Comment, *Market Manipulation and the Securities Exchange Act*, 46 Yale L.J. 624, 625 n.3 (1937); see also, Hickernell, *What Makes Stock Market Prices* 127 (1932).

[436] 15 U.S.C. 78i(e). Although, as Professor Loss has observed, "[t]here is no measure of damages specified in § 9 (e)," 3 Loss, *Securities Regulation* 1749, the courts have not hesitated to award damages for violations of Section 9. See, *e.g.*, *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 803-804 (C.A. 2, 1969); *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332 (C.A. 2, 1973); *Sarlie* v. *E. L. Bruce Co.*, 265 F. Supp. 371, 375-376 (S.D. N.Y., 1967) (holding that while proper measure of damages for violation of Section 9(a) would be the difference between the actual purchase price and a hypothetical purchase price in the absence of the manipulation, alternative measures of damages are also proper, including "the common law tort measure, i.e., the difference between the purchase price and the resale price where the security is sold prior to the discovery of the tort," 265 F. Supp. at 376, and a Section 11 measure, "i.e., the difference between the purchase price and the resale price where the security involved is sold prior to commencement of suit," 265 F. Supp. at 376).

pate[d]" in the manipulation."[437] In *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. at 1386-1387, this Court stated with regard to the "specified practices" proscribed by Section 9 that the legislative history of the Section revealed:

> "an overall congressional intent to prevent 'manipulative and deceptive practices which fulfill no useful function' and to create private actions for damages stemming from 'illicit practices,' where the defendant has not acted in good faith."

Thus, where the Commission has identified an "illicit practice"—such as the practices proscribed by Rule 10b-6—and a defendant engages in such practices in the absence of "good faith," liability should be established for the purposes of Section 9, to the extent the plaintiff can demonstrate it has been damaged as a result of the "illicit practices."[438] Acts and transac-

[437] See, *e.g.*, *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 794 (C.A. 2, 1969); *Britton* v. *Schweickart*, CCH Fed. Sec. L. Rep. ¶ 91,029 at p. 93,436 (S.D. N.Y., 1961).

[438] The formulation of damage-causation under Section 9 (e) that was articulated by this Court in *Hochfelder*, *supra*, may be somewhat less restrictive than the lower courts previously have held. See, *e.g.*, *Rosenberg* v. *Hano*, 121 F.2d 818 (C.A. 3, 1941); *Britton* v. *Schweickart*, CCH Fed. Sec. L. Rep. ¶ 91,029 at 93,436 (S.D. N.Y., 1961); *Wolfson* v. *Parkway Management Co.*, CCH Fed. Sec. L. Rep. ¶ 91,967 at 96,294 (S.D. N.Y., 1967).

While the Commission takes no position on whether Chris-Craft has established the requisite damage-causation required by Section 9(e), it should be noted that the standard would be satisfied if Chris-Craft could show that, after Bangor Punta's alleged Rule 10b-6 violation, it was compelled to purchase Piper securities at a higher price because of the effects of Bangor Punta's violation. If Chris-Craft did so,

tions that violate Rule 10b-6 and, consequently, Section 9(a)(6), which were not the result of good faith, are committed "willfully" for the purposes of Section 9(e).[439]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be:

1. Affirmed, insofar as it implies a private right of action on behalf of a competing tender offeror against those who have violated Section 14(e) of the Securities Exchange Act;

2. Affirmed, insofar as it imposes liability upon First Boston of not less than the maximum liability to which it would, by analogy, be subject under Section 11 of the Securities Act, but vacated and remanded to the district court for further findings to the extent it imposes upon First Boston liability in excess of that amount; and

3. Affirmed, insofar as it holds that Bangor Punta's purchases of Piper shares while Bangor Punta was engaged in a "distribution" of its own shares violated Securities Exchange Act Rule 10b-6,

---

Section 28(a), as we have seen, permits the award of compensatory damages.

[439] See, *e.g.*, *Hughes* v. *Securities and Exchange Commission*, 174 F.2d 969, 976-977 (C.A. D.C., 1949). Moreover, it has long been held that "[t]he requisite purpose and willfullness [necessary to establish a cause of action under Section 9(e)] is normally inferred from the circumstances of the case," *Crane Company* v. *Westinghouse Air Brake Company*, 419 F.2d 787, 794 (C.A. 2, 1969) (citations omitted); *accord*, *TSC Indus., Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126, 2140 n. 24 (1976).

and that a private right of action to remedy such a violation could be maintained.

Respectfully submitted.

HARVEY L. PITT,
General Counsel,

DAVID FERBER,
Solicitor,
ANDREW M. KLEIN,
Special Counsel,
JACOB H. STILLMAN,
Assistant General Counsel,
EGON GUTTMAN,*
Attorney Fellow,
IRVING H. PICARD,
Assistant General Counsel,
LEWIS H. MENDELSON,
Special Counsel,
JAMES H. SCHROPP,
Special Counsel,
KENNETH T. SPIRER,
Special Counsel,
RICHARD T. SHARP,
SAMMY S. KNIGHT,
FRANK A. WILSON,
SUE AUERBACH,
JOHN P. SWEENEY,
VERNON I. ZVOLEFF,
Attorneys,
Securities and Exchange Commission,
Washington, D.C. 20549 **

RALPH C. FERRARA,
Special Counsel,
Securities and Exchange Commission.

SEPTEMBER 1976.

---

* Professor Guttman is a member of the Middle Temple, Barrister at Law.

** Richard Weingarten, a May, 1976, graduate of the Antioch School of Law, Linda W. Jarrett, a May, 1976, graduate of the Georgetown University Law Center, and Catherine Scanlon, a third year student at the American University Washington College of Law, also assisted in the preparation of this brief.

I authorize the filing of this brief.

In the brief, the Securities and Exchange Commission takes the position that a defeated contestant for control of a corporation has a cause of action for money damages against persons who injured the defeated contestant by violating Section 14(e) of the Securities Exchange Act of 1934 or Rule 10b-6 in connection with tender offers made in the course of that control contest. The United States, in its brief *amicus curiae* filed at the invitation of this Court while the case was pending on petitions for a writ of certiorari, took that position as to violations of Section 14(e) but did not find it necessary separately to address the question as to violations of Rule 10b-6.

The Commission further takes the position in this brief that, in an action brought under Section 14(e), a defendant underwriter's liability appropriately may be limited to the maximum amount that could be assessed against it under Section 11 of the Securities Act of 1933 for underwriting securities pursuant to a misleading registration statement filed under that Act if the underwriter was acting in the capacity of an underwriter rather than in the capacity of a dealer-manager and its violation of Section 14(e) is attributable solely to mere negligence. The United States, in its brief *amicus curiae*, similarly took the position that an underwriter's liability should not be limited by Section 11 where the underwriter is found to have acted with *scienter*.

The Commission has taken no position in this brief on the question whether the court of appeals correctly

computed damages in this case. The United States, in its brief *amicus curiae*, took the position that the court of appeals had followed an incorrect approach in measuring damages.

ROBERT H. BORK,
Solicitor General.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 219869 300